No. _____

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1995

JOSE OLIVO,

Petitioner,

v.

DAVID K. MAPP,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a sheriff who fires a low-level, non-confidential, non-policymaking deputy sheriff for refusing to make monetary contributions to the sheriff's reelection campaign is entitled to qualified immunity from liability under 42 U.S.C. § 1983.

2. Whether a sheriff who fires a low-level, non-confidential, non-policy making deputy sheriff for stating his opposition to compulsory monetary contributions from deputies to the sheriff's reelection campaign and attendance by deputies at the sheriff's all-you-can-drink campaign beer party is entitled to qualified immunity from liability under 42 U.S.C. § 1983.

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No._____

In The Supreme Court
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Jose Olivo,
Petitioner,
vs.
David K. Mapp,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Jose Olivo respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered June 8, 1995, reversing a judgment of the United States District Court for the Eastern District of Virginia.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit, decided June 8, 1995, is included in the Appendix as Document No. 1. The Order of the United States Court of Appeals for the Fourth Circuit denying the petitioner's Petition for Rehearing with Suggestion for Rehearing in Banc, filed July 5, 1995, is included in the Appendix as Document No. 2. The Memorandum Opinion and Order of the United States District Court for the Eastern District of Virginia, Norfolk Division, filed September 14, 1994, denying the respondent's motion for summary judgment on the grounds of qualified immunity is included in the Appendix as Document No. 3. The Report and Recommendation of Magistrate Judge Prince entered June 17, 1994 recommending denial of respondent's motion for summary judgment is included in the Appendix as Document No. 4.

JURISDICTION

The judgment of United States Court of Appeals for the Fourth Circuit was entered June 8, 1995. Petitioner's timely Petition for Rehearing and Suggestion for Rehearing In Banc was denied on July 5, 1995.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). Review is also sought under Supreme Court Rule 10.1(c) on the ground that the United States Court of Appeals for the Fourth Circuit

has decided a federal question in a way that conflicts with applicable decisions of this Court.

CONSTITUTIONAL PROVISIONS, STATUTES, AND TREATIES INVOLVED

U.S. Const. Amend 1. Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. Amend. 14. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983. Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress. For purposes of this section, an Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

IDENTIFICATION OF THE PARTIES

Petitioner Jose Olivo ("Olivo") was formerly a deputy sheriff in the sheriff's department of the City of Norfolk, Virginia with an exemplary performance record on the job. Olivo was reassigned and then fired from his employment in July, 1993 by respondent David K. Mapp, the incumbent Sheriff, in retaliation for his refusal to make monetary contributions to and otherwise display support for Mapp and in retaliation for statements critical of Mapp's coercive fund raising efforts.

STATEMENT OF THE CASE[1]

In this Section 1983 action, Olivo asserts that Mapp violated his First and Fourteenth Amendment rights by firing him in retaliation for his refusal to make a monetary contribution to Mapp's reelection campaign, and in retaliation for Olivo making statements critical of Mapp's coercive fund-raising efforts and critical of an all-you-can-drink campaign beer party that all deputies were pressured to attend.

The relevant facts occurred in mid-1993, when respondent Mapp, the Sheriff of the City of Norfolk, was campaigning for reelection. Petitioner Olivo was a deputy sheriff who was employed in a nonpolicy making and nonconfidential position, who supervised no others, and who had little day-to-day contact with the sheriff. He was a deputy in the operation of the jail and was one of about 270 deputies in the Sheriff's Department.

The sheriff organized an "all-you-can-eat-and-drink" beer and crab feast as a campaign event, and he directed, through his top deputies, that his deputies attend. The cost was $40 per person, and the crab feast was scheduled for July 10. One day in late June, Olivo was instructed not to leave the jail at the end of his

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[1]The following summary of facts is taken from Magistrate Judge Prince's Report and Recommendation entered June 17, 1994, a copy of which is provided in the Appendix as Document 4.

shift until after Major Sterling, a top deputy, could speak to him and other deputies. Olivo followed instructions. Major Sterling advised the assembled deputies of the crab feast, its purpose, and its cost, and asked all to pay and attend. He also told them that Colonel Ellis, the top deputy, would speak to each of them individually to determine if they would attend. Ellis would also find out if anyone who did not plan to attend would nevertheless contribute to the campaign and, if so, in what amount. As a result of this information from Sterling, Olivo told Corporal Small, his immediate supervisor, that he did not intend to go to the crab feast because of his religious (Christian) and ethical views. Olivo also told Small that he did not approve of the event, because it encouraged deputies to drink and drive.

At the time of these events, Olivo was assigned to the first shift doing office work. As of June 30, he had made no contribution to the campaign, and on that day the sheriff caused Olivo to be reassigned to a post on the third shift, the least favorable, and one the sheriff used as a form of punishment. This reassignment was made in retaliation for Olivo's response to Major Sterling's announcement. Nevertheless, Olivo accepted the reassignment and performed his duties.

Sometime during the period of July 4-12, a police officer in the second precinct, Burt Williams,[2] asked Olivo if he had purchased a ticket for the crab feast. Olivo told Williams his reasons for not buying one. Williams also asked Olivo for his view concerning the election outcome. Olivo told Williams that he was neutral, and that he did not live in Norfolk so he could not vote in the election. The crab feast was held as scheduled. Olivo did not attend, and he never contributed to the sheriff's campaign.

Olivo was told on July 13 by his shift commander that he had been fired. The decision was made by the sheriff. Nothing that Olivo had said or done had interfered or potentially interfered with the operation of the Sheriff's Department, and he was fired because 1) he refused to buy a ticket to the crab feast, 2) he expressed his disapproval of the event, 3) he did not contribute to the campaign, and 4) he expressed his neutrality about the outcome of the election.[3]

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[2]A police officer is not a member of the Sheriff's Department.

[3]This case is before the Court in the context of a motion for summary judgment brought by respondent Mapp. The Court is required to view all facts and to draw reasonable inferences in the light most favorable to Olivo, the nonmoving party, *See Anderson v. Liberty Lobby*, 477 U.S. 242 (1986), as did the District Court.

Olivo brought this action in the United States District Court for the Eastern District on September 14, 1993. Federal jurisdiction existed below pursuant to 28 U.S.C. §§ 1331 and 1343 to adjudicate this case arising under the First and Fourteenth Amendments and 42 U.S.C. § 1983.

Following an evidentiary hearing on May 11, 1995 and argument of counsel, Magistrate Judge Prince issued his report and recommendation that the District Court deny summary judgment based on Mapp's qualified immunity defense. By Memorandum Opinion and Order dated September 14, 1995, the District Court denied summary judgment, holding that Mapp had violated Olivo's clearly established constitutional rights, of which Mapp should have known.

The District Court looked to two distinct lines of cases in its denial of Mapp's summary judgment motion. The court applied the line of decisions under *Connick v. Myers*, 461 U.S. 138 (1983) and *Pickering v. Board of Education*, 391 U.S. 563 (1968), addressing the scope of public employees' free speech rights, to determine Olivo's entitlement to constitutional protection for his speech. It also applied the analysis of *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 427 U.S. 347 (1976) and their progeny, which address circumstances where public employees are discharged because of their political affiliation or nonaffiliation, with respect to Olivo's nonexpressive conduct and nonaffiliation with Mapp's

party. Under both analyses, the District Court determined that Mapp was not entitled to qualified immunity under the circumstances alleged by Olivo and substantiated through affidavits and deposition testimony.

Mapp appealed the District Court's ruling to the United States Court of Appeals for the Fourth Circuit. In its *per curiam* opinion dated June 8, 1995, the Circuit Court determined Olivo had "failed to establish that his speech addressed a matter of public concern," *Olivo v. Mapp*, No. 94-2279, slip op. at 7 (4th Cir. June 8, 1995)(hereinafter "*Circuit Court Opinion*") such that a reasonable sheriff would have known that his actions with respect to Olivo would violate Olivo's First Amendment rights. *Id.* The Circuit Court neglected to analyze the constitutional ramifications of Mapp's coercion of campaign contributions and participation. It also ignored Mapp's retaliation against Olivo for his refusals to purchase a ticket to and attend the beer and crab campaign party, or otherwise to contribute to Mapp's reelection. The Circuit Court denied Olivo's petition for rehearing and suggestion for rehearing in banc, by Order filed July 5, 1995.

Olivo respectfully requests that a writ of certiorari issue to review the judgment and order of United States Court of Appeals for the Fourth Circuit.

REASONS FOR GRANTING THE WRIT

I.

The Fourth Circuit's Holding That a Public Employer is Entitled To Qualified Immunity Where He Fires a Public Employee For Refusal to Make Campaign Contribution to His Reelection Campaign Destroys Fundamental Constitutional Protections Long Recognized By This Court

Few principles are as fundamental to American democracy as an individual citizen's right under the First Amendment to be free from government coercion to make a monetary contribution to a political cause which he does not support. As this Court stated nearly twenty years ago in *Buckley v. Valeo*, 424 U.S. 1 (1976), contributing to an organization for the purpose of spreading a political message is a protected by the First Amendment, and limitations upon the freedom to contribute implicate fundamental First amendment interests. *Id.* at 23. Conversely, this Court examined the nature of an individual's right to be free from compulsion to contribute to political causes in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and found the compulsion to make contributions, rather than the prohibition from making contributions, was no less an infringement on constitutional rights. *Id.* at 234.

This Court acknowledged that "[t]his view has long been held," 431 U.S. at 235, n. 31, though the

Court cited no decisional authority. Rather, the Court quoted the author of the First Amendment, James Madison. "Who does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of one establishment, may force him to conform to any other establishment in all cases whatsoever?" *Id.* The Court then quoted Thomas Jefferson, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Id.*

It is precisely this form of tyranny, the compulsion against Olivo's will of contributions of money to fund Mapp's political campaign, that the First Amendment proscribes, if it is to afford any protection at all. "[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and conscience rather than coerced by the State." *Abood,* 431 U.S. 209, 235, *citing Elrod v. Burns*, 427 U.S. 347 (1976), among other cases.

While this is a case of first impression regarding retaliatory termination of a public employee for refusing to contribute to his superior's reelection campaign, this Court has addressed coerced political contributions in other contexts. *See, e.g., Abood*, 431 U.S. at 235 (articulating the prohibition against a public employer from requiring an employee to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public

educator); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991) (union members cannot be compelled to pay union dues used for political lobbying); and *Keller v. State Bar of California*, 496 U.S. 1 (1990) (unconstitutional violation of First Amendment rights for integrated state bar to expend dissenting members' mandatory bar dues beyond that reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services.)

Elrod's clearly articulated general prohibition against politically-motivated firing of public employees in the absence of a legitimate nexus between political affiliation and the effective performance of the public office involved, *Branti*, 445 U.S. at 518, should have provided abundant warning to Mapp that he violated core First Amendment rights when he discharged Olivo for refusing to make monetary contributions to Mapp's reelection campaign. Unlike overt expressive conduct, where there may exist legitimate governmental interests in the restriction of the time, manner, place and content of a public employee's speech or expressive action that should be balanced against the employee's First Amendment rights, *Connick v. Myers*, 461 U.S. 138 (1983), there can be no legitimate governmental interest in a public employer compelling a subordinate to make a monetary contribution to his reelection campaign.

Mapp has not proffered any such justification, nor could he do so.[4]

In 1982, more than a decade before Mapp transferred and then fired Olivo, this Court stated that "[f]or at least 15 years, it has been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick*, 461 U.S. at 142, *citing Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Perry v. Sinderman*, 408 U.S. 593, 597 (1972); *Branti v. Finkel*, 445 U.S. 507, 515-16 (1980). If the law in this area had been settled for 15 years in 1982, then Mapp had over 25 years of precedent to inform him of Olivo's rights when he acted in 1993.

Mapp had no basis for believing that he could compel monetary contributions from Olivo and the other deputies. Respondent has not cited even one case for the proposition that exacting compulsory campaign contributions from public employees is lawful, nor has petitioner's research revealed any such authority. There is no legitimate governmental interest to balance against Olivo's right to be free from Mapp's compulsion to contribute to his reelection campaign.

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[4]Under established Fourth Circuit principles, Olivo, a low-level deputy performing routine clerical functions, was not subject to raw patronage dismissal. *Jones v. Dodson*, 727 F.2d 1329, 1338 (4th Cir. 1984).

Mapp is not entitled to "good faith" qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) because his conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known" and because his conduct was specifically intended to coerce Olivo into relinquishing rights protected by the First Amendment and to punish Olivo for not doing so.[5]

This aspect of Mapp's violation of Olivo's constitutional rights was not susceptible to a *Connick* analysis, as it did not relate to a restraint or prohibition of Olivo's expressive conduct. The Circuit Court erred when it applied a *Connick* analysis in lieu of an *Elrod-Branti* analysis to evaluate these violations.

While the Fourth Circuit acknowledged the basic constitutional principles addressed by this Court,

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[5]Mapp's claim to qualified or "good-faith" immunity under *Harlow* fails because his reassignment of Olivo to a punishment post was specifically intended to coerce Olivo into relinquishing rights protected by the First Amendment and because Mapp then fired Olivo in intentional retaliation for Olivo's refusal to be cowed into attending Mapp's campaign-related beer and crab feast or otherwise making a monetary contribution to Mapp's campaign warchest. Such intentional interference by a public official with a known constitutional right constitutes malice that defeats qualified or "good faith" immunity. 457 U.S. at 815. (Brennan, J., concurring.)

it determined Mapp to be entitled to qualified immunity. As a result, a public employer in the Fourth Circuit is now entitled to qualified immunity where he fires a low-level employee for refusing to make a monetary contribution to the employer's reelection campaign, even where that employee could not be fired for patronage reasons.

This unprecedented result merits review by this Court.

II.

The Fourth Circuit's Holding That a Public Employer is Entitled To Qualified Immunity Where the He Fires a Public Employee For Voicing His Objections to Mandatory Employee Monetary Contribution to the Sheriff's Reelection Campaign and Attendance by Deputies at the Sheriff's All-You-Can-Drink Campaign Beer Party Undermines Constitutional Protections Clearly Recognized By This Court

Mapp attempted to coerce Olivo, and the other deputies in the sheriff's department, to contribute to and participate in Mapp's campaign beer party. Mapp fired him for refusing to do so and for expressing to his supervisor and a Norfolk police officer his objections on ethical and religious grounds, and his neutrality in the election.

As this Court has observed, "[T]he freedom of belief is no incidental or secondary aspect of the First Amendment's protection: `If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion *or force citizens to confess by word or act their faith therein.*'" 431 U.S. at 235 (emphasis added) *quoting West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). Mapp's efforts to create the impression of unanimous allegiance by department deputies through their presence at his campaign function is precisely the "confession by act" of support prohibited by the First Amendment. *See Wooley v. Maynard*, 430 U.S. 705 (1977) (motorist cannot be compelled to display state motto "Live Free or Die" on license plate); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974) (newspaper cannot be compelled to print response of political candidate attacked in editorials); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (school children cannot be compelled to salute flag); see also Gaebler, First Amendment Protection Against Government Compelled Expression and Association, 23 B.C. L. Rev. 995 (1982).

The Circuit Court "agree[d] with Olivo and the district court that coercive measures by a sheriff to raise funds for a campaign are matters of public interest," *Olivo v. Mapp*, No. 94-2279, slip op. at 6 (4th Cir. June 8, 1995)(hereinafter *Circuit Court Opinion*), yet denied Olivo any means of redress for

Mapp's violation of these important First Amendment rights.

Instead, the court restricted its analysis to an application of a balancing test derived from *Connick v. Myers*, 461 U.S. 138, 142 (1983), to determine whether Olivo's statements made in response to the coercion were constitutionally protected. The Court mischaracterized Olivo's statements as "a simple employee grievance," and dismissed any constitutional protection under the First Amendment. *Circuit Court Opinion* at 7.

The Court of Appeals relied upon panel's *Terrell v. University of Texas Sys. Police*, 792 F.2d 1360 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987), and its citation to *Kurtz v. Vickery*, 855 F.2d 723 (11th Cir. 1988)(Kravitch, J.) but quoted them out of context. In *Kurtz*, Judge Kravitch quoted *Terrell* to *criticize* its analysis as overlooking the Supreme Court's holding in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), "that a public employee's freedom of speech is not sacrificed merely because the employee `arranges to communicate privately with his employer rather than to spread his views before the public.'" 855 F.2d at 727. *Givhan* was cited with approval in *Connick*, 461 U.S. at 146. As this Court unanimously held only days after the Fourth Circuit's decision was issued, a state actor like Mapp "may not compel affirmance of a belief with which the speaker disagrees." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of*

Boston, 1995 U.S. Lexis 4050, at 30 (S.Ct. June 19, 1995).

In *Hurley*, the trial court and the Massachusetts Supreme Court had minimized the First Amendment rights of private parade organizers in part because those courts saw no distinct public message being purveyed by the parade. Those courts then reasoned that it would not violate the organizers' rights to compel them to admit a homosexuals' rights group to the march. But this Court *unanimously* reversed, saying:

> *whatever the reason* [for the organizers' objections], it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.

Id. at 33 (emphasis added).

This Court should apply these First Amendment principles to Olivo's case. Olivo was expressing to his superior in the sheriff's department and to a Norfolk policeman, matters relating to the candidate's unconstitutionally coercive actions to secure monetary contributions and participation for his reelection campaign. Like Bessie Givhan's statements to her superior, the statements made to by Olivo to his superior do not lose their constitutional protection

simply because they were made to Corporal Small rather than to the public, generally.

The discussion between Olivo and Williams is also constitutionally protected. Williams, a Norfolk police officer, solicited Olivo's views concerning Mapp's all-you-can-drink campaign beer party and inquiring into Olivo's position on Mapp's candidacy. This was a constitutionally-protected dialogue.

The fundamental importance of free political speech to American democracy was recognized in the Supreme Court's restatement of general constitutional principles in *Buckley v. Valeo*:

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people. Although First Amendment protections are not confined to the exposition of ideas, *there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs...of course includ[ing] discussions of candidates.*

* * *

> In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course we follow as a nation. As the Court observed in *Monitor Patriot Co. v. Roy*, it can hardly be doubted that *the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.*

424 U.S. at 14 (citations omitted, emphasis added).

"Speech concerning public affairs is more than self-expression, it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) cited in *Connick*, 461 U.S. at 145. These and this Court's other precedents clearly establish that speech regarding candidates for public office and the candidate's suitability for such office is precisely the type of speech warranting the highest degree of protection under the First Amendment.

As with the assistant district attorneys in *Connick* more than a decade before, "whether [deputy sheriffs] are pressured to work in political campaigns is a matter of interest to the community upon which it is essential that public employees be able to speak out

freely without fear of retaliatory dismissal." 461 U.S. at 149. The District Court so held below, stating:

> The Court finds as a matter of law that the expression Olivo asserts was the basis for his dismissal dealt with matters of public concern. The public had a legitimate political interest in the coercive means by which the sheriff raised his campaign funds. This was especially true since the speech took place in the context of an election. Moreover, Olivo's statement of neutrality was one of obvious political content, and therefore implicates the core of First Amendment concern. Likewise, his failure to contribute to Mapp's campaign, by either donation or by the purchase of a ticket to the crab feast, was one of obvious political content.

Olivo v. Mapp, No. 2:93cv946 slip op. (E.D. Va. Sept. 14, 1994) at 7 (hereinafter cited *"District Court Opinion"*)

The District Court found that there was no justification whatsoever for Mapp's actions. "The expression which allegedly resulted in plaintiff's termination, however, does not implicate a legitimate governmental interest. The defendant cannot seriously argue that plaintiff's comments were disruptive or called his competence into question. Moreover, refusal

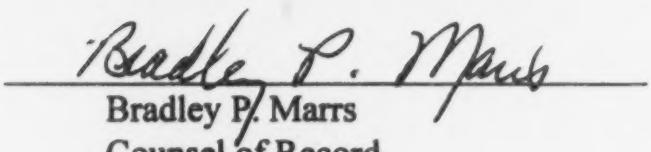
to silently acquiesce to the imposition of a loyalty tax is not indicative of disloyalty." *District Court Opinion* at 8 Indeed, if there was any disruption in the Norfolk's Sheriff's Department, the source of that disruption was Mapp, not Olivo. *Id.* and n. 10.

The Court of Appeals' ruling effectively erases this Court's holding in *Givhan* from the law of the Fourth Circuit. Further, it would create virtually a *per se* rule in favor of granting qualified immunity to public employers who interfere with employee speech on matters of public concern, even when the speech is addressed to "matters at the heart of the First Amendment," such as the qualification of candidates for political office. The Court of Appeals' decision clouds rights which were clearly established. Because of the confusion this decision is likely to create when compared to other decisions involving First Amendment protection of speech regarding candidates for public office and their qualifications, the Fourth Circuit's holding merits review by this Court.

CONCLUSION

For these reasons, petitioner respectfully requests that this Court grant this petition for a writ of certiorari.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOSE OLIVO,
Plaintiff-Appellee,

v.

DAVID K. MAPP, JR., individually,
and in his official capacity as
Sheriff of the City of Norfolk,
Defendant-Appellant.

No. 94-2279

and

City of Norfolk,
Defendant.

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk,
Raymond A. Jackson, District Judge
(ca-93-946)

Argued: May 3, 1995

Decided: June 8, 1995

Before HAMILTON and LUTTIG, Circuit Judges, and
LIVELY, Senior Circuit Judge of the United States

Court of Appeals for the Sixth Circuit, sitting by designation.

Reversed by unpublished per curiam opinion.

COUNSEL

ARGUED: William McCardell Furr, WILLCOX & SAVAGE, Norfolk, Virginia, for Appellant. Bradley Phipps Marrs, MEYER, GOERGEN & MARRS, P.C., Richmond, Virginia, for Appellee. **ON BRIEF:** Lawrence E. Luck, MEYER, GOERGEN & MARRS, P.C., Richmond, Virginia; Gary C. Byler, Virginia Beach, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6

OPINION

PER CURIAM:

Plaintiff-appellee, Jose Olivo (Olivo), brought suit under 42 U.S.C. § 1983 against the defendant-appellant, David Mapp (Mapp), Sheriff of the City of

Norfolk, alleging that Mapp discharged him in violation of his First and Fourteenth Amendment rights. Mapp moved for summary judgment on the basis of qualified immunity. The district court denied the motion, and Mapp appealed. We now reverse.

I

In June 1993, when Mapp was campaigning for reelection, Olivo was a deputy sheriff in the Sheriff's Department of the City of Norfolk, performing duties in a non-policy making, non-confidential position. Olivo, who was one of 270 deputies in the department, had no supervisory responsibilities and had little day-to-day contact with Mapp.

To raise funds for his reelection campaign, Mapp organized an all you can eat and drink beer and crab feast as a campaign event, and he asked, through his top deputies, that his deputies attend. The costs was forty dollars per person, and the crab feast was scheduled for July 10, 1993. One day late in June, Olivo was instructed not to leave the jail at the end of his shift until Major Sterling (Sterling), a top deputy, could speak to him and the other deputies. Sterling advised the assembled deputies of the crab feast, its purpose and cost, and asked all to pay and attend. He also told them that Colonel Ellis (Ellis), the top deputy, would speak to each of them individually to determine

if they would attend. Ellis would also determine if anyone who did not plan to attend would nevertheless contribute to the campaign and, if so, in what amount. As a result of this information from Sterling, Olivo told Corporal Small (Small), his immediate supervisor, that he did not intend to go to the crab feast because of his religious (Christian) and ethical views. Olivo told Small that he did not approve of the event because the event encouraged deputies to drink and drive.

At the time of these events, Olivo was assigned to the first shift doing office work. As of June 20, 1993, he had made no contribution to the campaign, and, on that day, Mapp reassigned Olivo to a post on the third shift, the least favorable, and the shift Mapp used as a form of punishment.

Sometime during the period of July 4 to July 12, a police officer in the second precinct, Officer Burt Williams (Williams), asked Olivo if he had purchased a ticket for the crab feast.[6] Olivo told Williams his reasons for not buying one. Williams also asked Olivo for his views concerning the election. Olivo told Williams that he was neutral and, in any event, could

[6]A police officer is not a member of the Sheriff's Department.

not vote in the election because he lived in Virginia Beach.

The crab feast was held as scheduled. Olivo did not attend, and he never contributed to Mapp's campaign. Olivo was told on July 13 by his shift commander that he had been fired. The decision to discharge Olivo was made by Mapp.

On September 14, 1993, pursuant to 42 U.S.C. § 1983, Olivo filed a complaint in the United States District Court for the Eastern District of Virginia alleging that Mapp had wrongfully discharged him in violation of his First and Fourteenth Amendment rights. On April 1, 1994, Mapp filed a motion for summary judgment based on the doctrine of qualified immunity. The district court denied the motion, and Mapp filed a timely notice of appeal.

II

Under doctrine of qualified immunity, government officials are immune from liability "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). Consequently, qualified immunity attaches when the government actor's conduct "does not violate clearly established statutory or

constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The question of qualified immunity, which is a question of law, *see id.*, asks "whether the plaintiff has alleged a violation of law that was clearly established at the time the challenged actions were taken." *DiMeglio v. Haines*, 45 F.3d 790, 794-95 (4th Cir. 1995); *see also Harlow*, 457 U.S. at 818.

When examining the right alleged to have been clearly established, we do not focus "'upon the right at its most general or abstract level, but at the level of its application to the specific conduct being challenged.'" *Wiley v. Doory*, 14 F.3d 993, 995 (4th Cir. 1994) (quoting *Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir. 1992)). "The rights must be clearly established under the particular circumstances confronting the official at the time of the questioned action'". *DiMeglio*, 45 F.3d at 803 (quoting *Slattery v. Rizzo*, 939 F.2d 213, 216 (4th Cir. 1991)). In other words, "[t]the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id.* "Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright

lines." *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1048 (1993). Accordingly, we must examine whether, at the time of Mapp's decision to discharge Olivo in July 1993, Olivo's speech was constitutionally protected expression.

In July 1993, determining whether a public employee's speech was constitutionally protected expression required the application of a balancing test. *See Connick v. Myers*, 461 U.S. 138, 142 (1983). Under this test, we must first consider whether the speech implicates a matter of public concern. If a matter of public concern is implicated, we must consider "whether the employee's interest in the speech was outweighed by the employer's 'interest in the effective and efficient fulfillment of its responsibilities.'" *Joyner v. Lancaster*, 815 F.2d 20, 23 (4th Cir.) (quoting *Connick*, 461 U.S. at 150), *cert. denied*, 484 U.S. 830 (1987); *see also Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) ("The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the

public services it performs through its employees.").[7] Causation is also required; that is, a public employer may avoid liability if the employer can establish that the employment action would have been made notwithstanding the employee's exercise of his or her First Amendment rights. *See Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

For speech to implicate a matter of public concern, the speech must related to a "matter of political, social, or other concern to the community." *Connick*, 461 U.S. at 146. Absent highly unusual circumstances, however, First Amendment protection is unavailable when "a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest." *Id.* at 147. Therefore, we must determine whether Olivo spoke on behalf of the public or himself as an employee. To resolve this, we examine the content,

[7]Because this case involves Olivo's expressive conduct, *i.e.*, his speech, the *Connick* test, rather than the test developed in party affiliation cases such as *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), controls. *See Jones v. Dodson*, 727 F.2d 1329, 1335 n.6 (4th Cir. 1984) ("Where the protected activity involves overt 'expression of ideas,' the more open-ended inquiry prescribed by *Pickering* and its progeny are required to accomplish the necessary balancing.").

form, and context of Olivo's speech. *Id.* at 147-48. Courts look to whether the employee attempted to communicate the speech to the public at large and the employee's motivation in speaking. *Id.* at 148.

In this case, Olivo's complaint alleges that he was fired for four reasons: (1) he did not buy a ticket to the crab feast; (2) he expressed disapproval of the crab feast; (3) he did not contribute to Mapp's campaign; and (4) he expressed his neutrality with regard to the election. The district court found that Olivo's speech addressed a matter of public concern:

> The public had a legitimate political interest in the coercive means by which the sheriff raised his campaign funds. This was especially true since the speech took place int he context of an election. Moreover, Olivo's statement of neutrality was of obvious political content, and, therefore implicates the core of First Amendment concern. Likewise, his failure to contribute to Mapp's campaign, by either donation or by the purchase of a ticket to the crab feast, was of obvious political content.

(J.A. 161).

While we agree with Olivo and the district court that coercive measures by a sheriff to raise funds for a campaign are matters of public interest, "'the mere fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment.'" *Kurtz v. Vickrey*, 855 F.2d 723, 727 (11th Cir. 1988) (quoting *Terrell v. University of Texas Sys. Police*, 792 F.2d 1360, 1362 (5th Cir. 1986), *cert. denied*, 479 U.s. 1064 (1987)). *Connick* teaches that speech "not otherwise of public concern does not attain that status because its subject matter could, in different circumstances, have been the topic of a communication to the public that might be of general interest." *Connick* teaches that speech "not otherwise of public concern does not attain that status because it subject matter could, in different circumstances, have been the topic of a communication to the public that might be of general interest." *Connick*, 461 U.S. at 148 n.6. Thus, the proper inquiry is whether the purpose of Olivo's speech was to raise issues of public concern. *See Morgan v. Ford*, 6 F.3d 750, 754 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 2708 (1994).

In this case, Olivo's speech was by no means an attempt to bring Mapp's alleged coercive practices to the public's attention. Olivo did not attempt to communicate his speech to the public at large, but rather only to Corporal Small (regarding the crab feast)

and a Norfolk police officer (regarding his neutrality in the election). Nor was Olivo's speech aimed at exposing any misconduct; his speech is more aptly characterized as an expression of frustration over being asked to pay forty dollars for the crab feast. In this regard, what is before the court is a simple employee grievance. As an employee grievance, Olivo's speech did not address a matter of public concern. *See Connick*, 461 U.S. at 146-47. In short, while Olivo's speech may have achieved public concern status if it was conveyed to the public at large, *Connick* clearly instructs us that speech "not otherwise of public concern does not attain that status because its subject matter could, in different circumstances, have been the topic of a communication to the public that might be of general interest." *Id.* at 148 n.6. The speech at issue in this case simply did not address a matter of public concern. Because Olivo failed to establish that his speech addressed a matter of public concern, a reasonable sheriff would not have known that Mapp's actions with respect to Olivo would violate Olivo's First Amendment rights. Accordingly, Mapp is entitled to qualified immunity. *See Harlow*, 457 U.S. at 818.

III

For the reasons stated, the judgment of the district court is reversed.

REVERSED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
July 5, 1995

No. 94-2279
CA-93-946

JOSE OLIVO

Plaintiff-Appellee,

v.

DAVID K. MAPP, JR., Individually and in his official capacity as Sheriff of the City of Norfolk

Defendant-Appellant.

and

CITY OF NORFOLK,
Defendant.

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,
/s/ Bert M. Montague

Clerk

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

JOSE OLIVO,

Plaintiff,

v. CIVIL ACTION NO. 2:93cv946

DAVID K. MAPP, JR., individually,
and in his official capacity as
Sheriff of the City of Norfolk,

Defendant.

MEMORANDUM OPINION AND ORDER

Before the Court are objections from both parties to a Report and Recommendation filed by Magistrate Judge Prince in response to defendant's Motion for Summary Judgment filed on April 1, 1994. This is an action by a former deputy sheriff of the City of Norfolk against the Sheriff of Norfolk in his individual capacity brought under 42 U.S.C. § 1983.[8] The deputy sheriff

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[8]The Sheriff of Norfolk was also sued in his official capacity, but in response to the motion for summary judgment, plaintiff conceded that he had no cause of action against the sheriff in his official capacity.

alleges that he was fired by the sheriff in violation of his rights of freedom of speech and religion, under the First and Fourteenth Amendments to the Constitution of the United States.

I. PROCEDURAL BACKGROUND

The sheriff filed a motion for summary judgment based on assertions that plaintiff has failed to produce any evidence that he was fired for political reasons, and that the sheriff is entitled to qualified immunity because the law is not clearly established that he could not fire a deputy for failing to support his reelection campaign. Based upon plaintiff's counter-filings, the sheriff has conceded that there are genuine issues of fact concerning his motive for firing plaintiff. Therefore, the only issue remaining concerning the summary judgment motion is whether the sheriff is entitled to qualified immunity.

II. FACTS

The Court adopts in full the facts, construed in the light most favorable to the plaintiff, as recited by the Magistrate Judge:

> The relevant facts occurred in mid-1993, when the defendant, David K. Mapp, the Sheriff of the City of Norfolk, was campaigning for reelection. Plaintiff, Jose Olivo, was a deputy sheriff who was employed in a nonpolicymaking and nonconfidential position, who supervised

no others and who had little day-to-day contact with the sheriff. He was a deputy in the operation of the jail and was one of about 270 deputies in the Sheriff's Department.

The sheriff organized an "all-you-can-eat-and-drink" beer and crabfeast as a campaign event, and he asked, through his top deputies,[9] that his deputies attend. The cost was $40 per person, and the crabfeast was scheduled for July 10, 1993. One day in late June, Olivo was instructed not to leave the jail at the end of his shift until after Major Sterling, a top deputy, could speak to him and other deputies. Olivo followed instructions. Major Sterling advised the assembled deputies of the crabfeast, its purpose, and its cost, and asked all to pay and attend. He also told them that Colonel Ellis, the top deputy, would speak to each of them individually to determine if they would attend. Ellis would also find out if anyone who did not plan to attend would nevertheless contribute to the campaign and, if so, in

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[9]The Sheriff of Norfolk was also sued in his official capacity, but in response to the motion for summary judgment, plaintiff conceded that he had no cause of action against the sheriff in his official capacity.

what amount.[10] As a result of this information from Sterling, Olivo told Corporal Small, his immediate supervisor, that he did not intend to go to the crabfeast because of his religious (Christian) and ethical views. Olivo also told Small that he did not approve of the event, because it encouraged deputies to drink and drive.

At the time of the events, Olivo was assigned to the first shift doing office work. As of June 30, 1993, he had made no contribution to the campaign, and on that day the sheriff caused Olivo to be reassigned to a post on the third shift, the least favorable, and one the sheriff used as a form of punishment. This reassignment was made in retaliation for Olivo's response to Major Sterling's announcement. Olivo accepted the reassignment and performed his duties.

Sometime during the period of July 4-12, a police officer in the second

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[10]It is not alleged, and none of the supporting evidence filed by Olivo suggests, that Ellis made any personal contact with him about the matter. In his deposition, Ellis denied speaking to Olivo about the crabfeast.

precinct, Burt Williams,[11] asked Olivo if he had purchased a ticket for the crabfeast. Olivo told Williams his reasons for not buying one. Williams also asked Olivo for his view concerning the election outcome. Olivo told Williams that he was neutral, and that he lived in Virginia Beach and could not vote in Norfolk in any event. The crabfeast was held as scheduled. Olivo did not attend, and he never contributed to the sheriff's campaign.

Olivo was told on July 13 by his shift commander that he had been fired. The decision was made by the sheriff. Nothing that Olivo had said or done had interfered or potentially interfered with the operation of the Sheriff's Department, and he was fired because 1) he refused to buy a ticket to the crabfeast, 2) he expressed his disapproval of the event, 3) he did not contribute to the campaign, and 4) he

[11]A police officer is not a member of the Sheriff's Department.

expressed his neutrality about the outcome of the election. Complaint, para. 22.[12]

The Court notes that the defendant asserts that Olivo was actually fired for leaving his post, not for the reasons advanced by plaintiff. As defendant concedes, however, this issue is factually in dispute and therefore consideration of it is not proper at summary judgment.

III. DISCUSSION

Federal Rule of Civil Procedure 56(c) provides that a moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment is initially responsible for identifying those portions of the factual record which it believes establish that there are no genuine issues of material fact. Once the moving party has made this showing, the opposing party must demonstrate, by reference to affidavits, depositions, answers to interrogatories, or admissions, that a triable

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[12]Mapp, a Democrat, lost the election to his Republican opponent, who has assumed the office as Sheriff of the City of Norfolk. At the initial pretrial conference, Olivo withdrew his prayer that he be reinstated. He seeks only monetary damages and attorney's fees.

issue of fact exists. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). In deciding a motion for summary judgment, the court is required to view the facts and draw reasonable inferences in a light most favorable to the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Should the nonmoving party present a genuine issue of fact that could lead to a reasonable jury returning a verdict in their favor, the motion for summary judgment must be denied. *Id.*

Under the qualified immunity doctrine, if the plaintiff has not provided more than "bare allegations of malic[ious intent],...government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982). Absent substantial allegations of malice,

> [o]n summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.

Harlow, 457 U.S. at 818. Additionally, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). If they are not, a summary judgment motion must be granted, since the issue before this court is an "essentially legal question" and since "the entitlement is an *immunity from suit* rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

There are two distinct lines of cases which establish the parameters of permissible dismissal of public employees under the First Amendment. *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), address circumstances where public employees are discharged solely because of their political affiliation or nonaffiliation. *Connick v. Myers*, 461 U.S. 138 (1983), and *Pickering v. Board of Education*, 391 U.S. 563 (1968), govern the legality of firing public employees for their speech.

In the case at bar, Sheriff Mapp's motive for firing Olivo involves elements of both the *Connick-Pickering* free speech analysis and the *Elrod-Branti* political association analysis. The plaintiff alleges that his firing was motivated by his speech and his failure to contribute to Sheriff Mapp's campaign. The speech clearly falls under *Connick*. Failure to contribute, however, is more properly analyzed as affiliation, rather than as speech, since the Supreme Court specifically included coercive

contribution among the practices it condemned in the leading affiliation cases. *Elrod*, 427 U.S. at 355-56;[13]

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[13]"The cost of practice of patronage is the restraint it places on association. In freedoms of belief and order to maintain their jobs, respondents were required to pledge their political allegiance to the Democratic Party, work for the election of other candidates of the Democratic Party, *contribute a portion of their wages to the Party*, or obtain the sponsorship of a member of the Party, usually at the price of one of the first three alternatives... *[A]ny assessment of [respondent's] salary is tantamount to coerced belief.*" *Elrod*, 427 U.S. at 355 (emphasis added).

Branti, 445 U.S. at 515-16.[14] However, to resolve the issues in this case, the court deems it appropriate to apply the principles set forth in *Connick-Pickering*.

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[14]*Abood v. Detroit Bd. of Educ.* held that the First Amendment clearly prohibits government institutions, acting as employers, from requiring employees to contribute to an ideological cause they may oppose as a condition of retaining public employment. *See* 431 U.S. 209, 234-35 (1976). A strong argument can be made that *Abood* establishes a third category of First Amendment termination cases apart from *Connick-Pickering* and *Elrod-Branti* in which termination for failure to contribute is never permissible. Under this argument, qualified immunity can be denied on the basis of *Abood* alone, since the language from *Abood* cited in the text was clearly established at the time of Olivo's dismissal. In *Abood*, however, no effort had been made to terminate any of the plaintiffs. *See* 431 U.S. at 213 n.2. Since *Elrod* and *Branti* address this conduct in the context of terminations and since the case at bar also involves overt expression, the court deems it prudent to analyze the facts at bar under the conventional First Amendment analysis of *Connick-Pickering* and *Elrod-Branti*.

A. Connick-Pickering Analysis

The sheriff's motivation for firing Olivo places the discharge within the ambit of *Connick-Pickering*.[15] The *Connick-Pickering* line of cases establishes that, given the legitimate interest of government entities in limiting the speech of employees, such employees are not entitled to the same level of First Amendment protection as the general population. *See Pickering*, 391 U.S. at 568 (1968). In analyzing the facts at bar under *Connick*, the Court must consider Olivo's allegation that he was terminated for failure to contribute as well as for his

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[15]Defendant invokes the *Connick* analysis "[b]ecause[] the Plaintiff alleges that he was dismissed on account of his 'overt expressive conduct....'" Complaint ¶ 9. The phrase "overt expressive conduct" does not appear in the complaint. Only two of the four reasons for the firing were alleged to be overtly expressive. The refusal to buy a ticket to the crabfeast and the failure to contribute to the campaign were not overtly expressive, nor were they alleged to be expressive. Complaint, ¶ 22.

speech. If the court did not take this course, Olivo's First Amendment interest would not be fully considered.[16]

The first step in the *Connick* analysis is to determine whether the speech in question implicates a matter of public concern. If it does not, the government has wide discretion to dismiss its employees without fear of judicial review on First Amendment grounds. *See Connick*, 461 U.S. at 146-47. Whether employee speech addresses a matter of public concern "must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48. Of these, content "is always the central aspect." *Arvinger v. Baltimore*, 862 F.2d 75, 79 (4th Cir. 1988). This inquiry is one of law. *See Connick*, 461 U.S. at n.7.

Olivo does not allege that he ever expressed or attempted to express his objections to the crab feast to the electorate or to his fellow deputies, other than to Corporal Small. However, the Supreme Court has stated that its decisions

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[16]Although in the abstract, *not* contributing to a campaign is arguably not expressive conduct, Olivo's failure to do so did not occur in a vacuum. In an environment in which substantial pressure to contribute is exerted and in which those exerting the pressure are obviously monitoring who has contributed and who has not, failure to contribute clearly must be protected. The First Amendment does not sanction compulsory contribution to political causes. See *Abood v. Detroit of Bd. of Educ.*, 431 U.S. 209, 234-35 (1976).

> do not support the conclusion that a public employee forfeits his protection against government abridgement of freedom of speech if he decides to express his views privately rather than publicly. While [prior] cases each arose in the context of a public employee's public expression, the rule to be derived from them is not dependent on that largely coincidental fact. *Givhan v. Western Line*, 439 U.S. 410, 414 (1978).

The focus is "upon whether the `public' or the `community' is likely to be truly concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a `private' matter between employer and employee." *Berger v. Battaglia*, 779 F.2d 992,999 (4th Cir. 1985), *cert. denied*, 476 U.S. 1159 (1986).

The Court finds as a matter of law the expression Olivo asserts was the basis for his dismissal dealt with matters of public concern. The public had a legitimate political interest in the coercive means by which the sheriff raised his campaign funds. This was especially true since the speech took place in the context of an election. Moreover, Olivo's statement of neutrality was one of obvious political content, and therefore implicates the core of First Amendment concern. Likewise, his failure to contribute to Mapp's campaign, by either donation or by the purchase of a ticket to the crab feast, was one of obvious political content.

The second prong of the test involves the fact question of whether the employee would have been fired in the absence of the protected conduct. *Daniels v. Quinn*, 801 F.2d 687, 689 (4th Cir. 1986). As noted above, this issue is not ripe for summary judgment.

The third prong of the test is "whether the employee's interest in the speech was outweighed by the employer's `interest in the effective and efficient fulfillment of its responsibilities to the public.'" *Joyner v. Lancaster*, 815 F.2d 20, 23 (4th Cir. 1987) (quoting *Connick*, 461 U.S. at 150). The factors to be considered in performing this balancing analysis include the employer's interest in "discipline and harmony in the workplace, confidentiality.... freedom to discharge an employee whose speech has impeded the proper performance of his duties or is so lacking in foundation as to call his competence into question, and protection of close working relationships that require loyalty and confidence." *Piver v. Pender County Board of Educ.*, 835 F.2d 1076, 1081 (4th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988). Other relevant factors are "the time, place and manner of the speech; the context in which the dispute arose; [and] the degree of public interest in the speech." *Id.* "[T]he entire balancing process is an inquiry of law." *Joyner*, 815 F.2d at 23.

The expression which allegedly resulted in plaintiff's termination, however, does not implicate a legitimate governmental interest. The defendant cannot seriously argue that plaintiff's comments were disruptive or called his competence into question. Moreover,

refusal to silently acquiesce to the imposition of a loyalty tax is not indicative of disloyalty.[17] Defendant merely makes abstract, generalized allusions to the need for loyalty in a sheriff's department and declares that a reasonable sheriff could believe that this need outweighed Olivo's First Amendment interests. If the court were to be persuaded by this argument under *these* facts, it would essentially be holding that any claim of a loyalty interest by a sheriff's department, no matter how insignificant or unsupported, always provides sufficient basis for a finding of qualified immunity. Although other Circuits have recognized that, given the extremely fact specific nature of the delicate balancing inquiry involved in *Connick* cases, qualified immunity should rarely be denied, *see e.g., Bartlett v. Fisher*, 972 F.2d 911 (8th Cir. 1992); *McDaniel v. Woodard*, 886 F.2d 311, 314 (11th Cir. 1989), a *per se* rule in favor of granting qualified immunity to public employers in *Connick* cases does not exist. Accordingly, in this case, the court finds that qualified immunity is not proper under *Connick*.

B. *Elrod-Branti* Analysis

Plaintiff claims that the reasons for his termination were his nonexpressive conduct and nonaffiliation with a political party. Even with the caution the Court of Appeals for the Fourth Circuit urges in *Jones v. Dodson*,

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[17]Logic tells the court that the actions of the sheriff would have been infinitely more disruptive to discipline, harmony, efficiency and morale than anything which plaintiff alleges led to his firing.

to limit application of the *Elrod-Branti* analysis to cases involving raw political patronage,[18] the court is persuaded that Elrod and Branti may govern some of Sheriff Mapp's conduct in firing Olivo. Should the Court of Appeals revisit the scope of the application of Elrod-

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[18]Footnote 6 states in part: "We recognize the [*Elrod-Branti*] principle might be thought to run as well to coerced political loyalty to individual employers (even of the same political party). ... We do not believe the test is suited to the 'personal political loyalty' situation; it is too narrow." *Jones*, 727 F.2d at 1334-35 n.6.

On the other hand, footnote 6 also states that the reason for this conclusion is that

> [t]he effect of such an extension of *Elrod-Branti* patronage discharge principles would be, however, necessarily to carry over to other discharges than those solely for party affiliation... [These principles are] not flexible or broad enough to protect governmental interests in avoiding a variety of employee "expressions" involving specific insubordination or dereliction of duty having a "political" tinge or, conceivably, deliberately given a "political" cloak. *Id* at 1335.

Since the court finds that the facts, taken in the light most favorable to the plaintiff, involve no such insubordination or dereliction of duty, the rational behind the language quoted in the first paragraph of this footnote counsels against applying it to the facts at bar.

Branti, even under an Elrod-Branti analysis, Sheriff Mapp would not be entitled to immunity.

The *Elrod* and *Branti* cases concerned plaintiffs who were of one major political party and who were discharged or threatened with discharge because of that affiliation, or because they had no sponsorship in the other major political party. If *Elrod* and *Branti* are to be limited to patronage practices involving Democrats firing Republicans and vice-versa, the sweeping language used in them is hollow indeed.[19] It would be ironic if a Republican employee has the protection of the First Amendment against being fired by a Democrat for raw patronage reasons, but a nonpartisan employee has no such protection if he refuses to support a candidate. Moreover, in *Connick*, the Court explicitly stated the principle to be gleaned from *Elrod* and *Branti*: "[o]fficial pressure upon employees to work for political candidates not of the worker's own choice constitutes a coercion of belief in violation of fundamental constitutional rights." 461 U.S. at 149. Therefore, cases that speak of raw patronage in terms of political parties cannot intend to say that an employee who chooses to

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[19]In *Elrod*, the Court said that "political belief and association constitute the core of those activities protected by the First Amendment." 427 U.S. at 356. In *Branti*, it said: "If the First Amendment protects a public employee from discharge based on what he has said, it must also protect him from discharge based on what he believes." 445 U.S. at 515.

remain independent has no right to be free in his beliefs and associations if while working in a government job.

Since the legitimate reason for dismissal proffered by the defendant is factually in dispute, for purposes of this motion it must be assumed that Olivo would not have been fired but for the protected conduct.

> The Court in *Elrod* stated that
> [P]olitical belief and association constitute the core of those activities protected by the First Amendment.... "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics... or force citizens to confess by word or act their faith therein." *Id.* at 356 (quoting *Board of Education v. Barnett*, 319 U.S. 624, 642 (1943)).
>
> Under [patronage] practice, public employees hold their jobs on the condition that they provide, in some acceptable manner, support for the favored political party. The threat of dismissal for failure to provide that support unquestionably inhibits protected belief and association, and dismissal for failure to provide that support only penalizes its exercise.

Id. at 360.

Elrod, along with *Branti*, established that unless "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved," *Branti*, 445 U.S. at 518, "the practice of patronage dismissals is unconstitutional under the First and Fourteenth Amendments." *Elrod* at 373.[20] There is no question that these cases have clearly established that a dismissal for failure to give a coerced contribution is a patronage dismissal. *Elrod*, 427 U.S. at 355-56; *Branti* 445 U.S. at 515-16.[21] Therefore, unless party affiliation is an appropriate requirement for the position of deputy, *Elrod* and *Branti* have clearly established that Olivo could not be fired for failing to contribute to Sheriff Mapp's campaign. Defendant argues that the law on whether

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[20]In *Branti*, the Court refused to limit *Elrod* to "situations in which government employees are coerced into pledging allegiance to a political party they would not voluntarily support [and to hold that it] does not apply to a simple requirement that an employee be sponsored by the party in power." 445 U.S. at 512. The Court said: "If the First Amendment protects a public employee from discharge based on what he has said, it must also protect him from discharge based on what he believes," *id.* at 515; and "the First Amendment prohibits the dismissal of a public employee solely because of his private political beliefs." *Id.* at 516-17.

[21]The Court also has grave concerns that coercing Olivo to attend or at least buy a ticket to an event to which he objected on religious grounds violated his free exercise rights under the First Amendment.

party affiliation is an appropriate requirement is so uncertain that he is entitled to qualified immunity. He urges the Court to follow the rationale of the Seventh Circuit, which granted qualified immunity to a sheriff for the patronage dismissal of a deputy. *Upton v. Thompson*, 930 F.2d 1209, (7th Cir. 1991).[22] This court, however, rejects the defendant's invitation to follow the Seventh Circuit, since the Fourth Circuit has definitively spoken on the issue on *Jones v. Dodson*, 727 F.2d 1329 (4th Cir. 1984). The Court said:

> The *Branti* emphasis, which now controls in raw patronage situations, is not upon size, or intimacy of working associations, or needs of discipline, but upon the extent to which discharged employees engage in policymaking related to "partisan political interests" and have access to confidential information "bearing whatsoever on partisan political concerns." *Branti*, 445 U.S. at 519. Flatly rejected in *Branti* was any general notion that mutual trust and confidence could only exist between members of the same political party in any agency of the small size there involved....

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[22]The *Upton* court stated: "Given the dependency of the sheriff (and his political survival) on his deputies' job performance, it is understandable why a sheriff might believe that party loyalty is an appropriate consideration for a deputy sheriff." *Id.* at 1216.

> Under the *Branti* test, we do not believe that the duties of deputy sheriffs, no matter what the size of the office, or the specific position of power involved, or the customary intimacy of the associations within the office, or the undoubted need for mutual trust and confidence within any law enforcement agency, could be found to involve policymaking related to "partisan political interests" and to involve access to confidential information "bearing... on partisan political concerns." On this basis, we hold that if [plaintiff's] discharge was solely because of his political party affiliation, it could not as a matter of law be justified under the *Branti* test.

Id. at 1338 (citation omitted). For the reasons stated above, under *Elrod-Branti*, Sheriff Mapp is not entitled to immunity.

C. The Law is Clearly Established

To further support his request for immunity, Sheriff Mapp argues that Virginia law is not clearly established regarding whether a sheriff can fire a deputy for any or no reason at all. Sheriff Mapp relies on *Whited v. Fields*, 581 F. Supp. 1444 (W.D.Va. 1984), which he asserts has not been overruled, and on a series of unpublished cases which he claims would be contradicted if his request of immunity was rejected.

Sheriff Mapp's reliance on these cases does not persuade the court he is entitled to immunity.

In *Whited*, a newly elected Democratic sheriff did not rehire 29 of the 34 people serving the retired sheriff. All 29 had actively campaigned for the old sheriff's Republican chief deputy, who lost the election. The court found that the new sheriff had failed to meet his burden of proving, by a preponderance of the evidence, that he would have reached the same decision in the absence of the exercise of "their right of free speech to support a political candidate of their own choosing." *Id.* at 1448. Therefore, the court found that the plaintiffs had satisfied the first two prongs of the *Connick* test.

Although the facts stated in *Whited* are clearly speech in the *Connick* sense, Judge Williams stated that "[t]his court... will look to *Elrod* and *Branti*, the situation that exists in Virginia today, and the relationship between the sheriff and his employees in determining whether or not this case falls within an exception set forth in *Elrod-Branti*."[23] *Id.* at 1452. Judge Williams held:

> [u]nder the public policy of Virginia, a deputy sheriff and the sheriff are one and the same, and there is no distinction.... To mandate that a sheriff must accept the

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[23]For this reason, Sheriff Mapp's *Whited* argument is equally applicable whether these facts are analyzed under *Connick-Pickering* or *Elrod-Branti*.

> deputies that he finds in office simply because they belong to another political party even though he is totally responsible for all their acts is incredible, and beyond the bounds of common sense.

Id. at 1456.

Judge Williams concluded that none of the deputies had any First Amendment right to be rehired because the new sheriff "believed he was following the will of the electorate, and [] the public policy of Virginia serves a vital government end resulting in an exception to the *Elrod-Branti* doctrine." *Id.* at 1457.

Despite the rationale of *Whited*, however, Sheriff Mapp's argument must fail. The court finds that due to *Jones v. Dodson*, the law is clear that a sheriff cannot fire a deputy merely because of his party affiliation. A fortiori, a sheriff cannot fire a deputy because the deputy refuses or fails to support the election of the sheriff. Further, the law is clearly established that a reasonable sheriff cannot fire a deputy who is not affiliated with a political party, where the deputy refuses or fails to support the sheriff's reelection.

In Jones v. Dodson, the Fourth Circuit repudiated the rationale of the *Whited* decision just weeks before the incident at bar. *Whited* was clearly dead at the time Mapp fired Olivo. This court will not grant the defendant an immunity to which he is not entitled simply by virtue of the fact that *Whited* has never been overruled

by name. Therefore, *Whited* provides no basis for shielding Mapp from liability.

The court also adopts an alternative ground for denying qualified immunity. The *Harlow* court held that "bare allegations of malice should not suffice to subject government officials" to the burdens of litigation. 457 U.S. at 817-18. This plaintiff, however, has produced more than bare allegations. The court notes that the facts alleged here are egregious. A sheriff in Virginia is vested with many powers. It is inconceivable, however, that the sheriff could honestly believe that he has the authority to force his employees to contribute to his election campaign. The court cannot comprehend how a sheriff could fire a reliable employee in retaliation for that employee's failure to contribute to his campaign without malice. Moreover, plaintiff's affidavits contain substantially more than bare allegations that his transfer and termination were part of a pattern of impermissibly motivated disciplinary actions engineered by Mapp. Under these circumstances, the Sheriff is not entitled to qualified immunity.

CONCLUSION

For the reasons stated under the court's analysis of Olivo's termination under Connick-Pickering, Sheriff Mapp's request for qualified immunity is **DENIED.** Further, to extent the reasons for termination of Olivo are governed by *Elrod-Branti*, and for other reasons stated in this opinion, the request for immunity is **DENIED.**

IT IS SO ORDERED.

/S/

UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

September 14, 1994

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

JOSE OLIVO,

Plaintiff,

v. CIVIL ACTION NO. 2:93cv946

DAVID K. MAPP, JR., Individually
and in his official capacity as
Sheriff of the City of Norfolk,

Defendant.

REPORT & RECOMMENDATION
Order of Designation

United States District Judge J. Calvitt Clarke, Jr., by an Order entered May 9, 1994, designated the undersigned Magistrate Judge to conduct a hearing and to submit to a judge of the Court proposed recommendations for disposition by the judge of defendant's Motion for Summary Judgment filed on April 1, 1994.

A hearing was held on May 11, 1994, at which Bradley P. Marrs, Esquire appeared for plaintiff; and William M. Furr, Esquire appeared on behalf of defendant.

William M. Furr, Esquire appeared on behalf of defendant.

Nature of the Case

This is an action by a former deputy sheriff of the City of Norfolk against the Sheriff of Norfolk in his individual capacity[24] brought under 42 U.S.C. § 1983, alleging that he was fired by the sheriff in violation of his rights of freedom of speech andreligion as provided by the First and Fourteenth Amendments to the Constitution of the United States.

Proceedings

The sheriff has filed a motion for summary judgment supported by his own affidavit and a portion of plaintiff's deposition. The grounds offered are that plaintiff has failed to produce any evidence that he was fired for political reasons, and that the sheriff is entitled to qualified immunity, because the law is not clearly established that he could not fire a deputy for failing to support him in his reelection campaign. Plaintiff filed a number of counter affidavits, portions of depositions, and answers to interrogatories. As a result of the counter affidavits, the sheriff has conceded that there are genuine issues of fact concerning his motive for firing plaintiff. Therefore, the only issue remaining on the summary

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[24]The sheriff was sued in his official capacity also, but in response to the sheriff's motion for summary judgment, plaintiff conceded that he had no cause of action against the sheriff in his official capacity.

judgment motion is whether the sheriff is entitled to qualified immunity.[25]

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[25]In effect, this single issue is presented on the pleadings, and could be treated as a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the reverse of the usual pattern. The reason for this is that the sheriff's affidavit and the portion of plaintiff's deposition filed by the sheriff, and the affidavits, depositions, and answers to interrogatories filed by plaintiff are almost totally related to the issue of the sheriff's motivation for firing Olivo, an issue the parties now agree is in dispute. The qualified immunity issue is determinable on the claim as alleged, because the affidavits, depositions and interrogatory answers shed no light on that issue. Part of the sheriff's affidavit expresses his belief that he thought he had a right to fire plaintiff. He said: "It was my understanding that Sheriffs in Virginia can refuse to retain deputies who do not support them, politically or otherwise. I still believe that Sheriffs have wide discretion in discharging deputies." (Affidavit of David K. Mapp, ¶ 2, Defendant's Memorandum In Support of His Motion for Summary Judgment, Exhibit A. (Docket Entry #23.)) In his deposition, however, Mapp was uncertain of his knowledge of case law that applied to the firing of deputies for political reasons, and he later supplemented his deposition by way of an addendum to supplemental answers to interrogatories by stating that he did not seek legal advise before firing Olivo. These statements do not affect the claim as alleged.

Facts

The relevant facts occurred in mid-1993, when the defendant, David K. Mapp, the Sheriff of the City of Norfolk, was campaigning for reelection. Plaintiff, Jose Olivo, was a deputy sheriff who was employed in a nonpolicymaking and nonconfidential position, who supervised no others, and who had little day-to-day contact with the sheriff. He was a deputy in the operation of the jail and was one of about 270 deputies in the Sheriff's Department.

The sheriff organized an "all-you-can-eat-and-drink" beer and crabfeast as a campaign event, and he asked, through his top deputies,[26] that his deputies attend. The cost was $40 per person, and the crabfeast was scheduled for July 10. One day in late June, Olivo was instructed not to leave the jail at the end of his shift until after Major Sterling, a top deputy, could speak to him and other deputies. Olivo followed instructions. Major Sterling advised the assembled deputies of the crabfeast, its purpose, and its cost, and asked all to pay and attend. He also told them that Colonel Ellis, the top deputy, would speak to each of them individually to determine if they would attend. Ellis would also find out if anyone who did not plan to attend would nevertheless contribute

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[26]It is not alleged that Olivo and Mapp had any direct or fact-to-face contact with regard to any of the events giving rise to the claim.

to the campaign and, if so, in what amount.[27] As a result of this information from Sterling, Olivo told Corporal Small, his immediate supervisor, that he did not intend to go to the crabfeast because of his religious (Christian) and ethical views. Olivo also told Small that he did not approve of the event, because it encouraged deputies to drink and drive.

At the time of these events, Olivo was assigned to the first shift doing office work. As of June 30, he had made no contribution to the campaign, and on that day the sheriff caused Olivo to be reassigned to a post on the third shift, the least favorable, and one the sheriff used as a form of punishment. This reassignment was made in retaliation for Olivo's response to Major Sterling's announcement. Nevertheless, Olivo accepted the reassignment and performed his duties.

Sometime during the period of July 4-12, a police officer in the second precinct, Burt Williams,[28] asked Olivo if he had purchased a ticket for the crabfeast. Olivo told Williams his reasons for not buying one. Williams also asked Olivo for his view concerning the election outcome. Olivo told Williams that he was

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[27]It is not alleged, and none of the supporting evidence filed by Olivo suggests, that Ellis made any personal contact with him about the matter. In his deposition, Ellis denied speaking to Olivo about the crabfeast.

[28]A police officer is not a member of the Sheriff's Department.

neutral, and that he lived in Virginia Beach and could not vote in Norfolk in any event. The crabfeast was held as scheduled. Olivo did not attend, and he never contributed to the sheriff's campaign.

Olivo was told on July 13 by his shift commander that he had been fired. The decision was made by the sheriff. Nothing that Olivo had said or done had interfered or potentially interfered with the operation of the Sheriff's Department, and he was fired because 1) he refused to buy a ticket to the crabfeast, 2) he expressed his disapproval of the event, 3) he did not contribute to the campaign, and 4) he expressed his neutrality about the outcome of the election.[29]

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[29]Mapp, a Democrat, lost the election to his Republican opponent, who has assumed the office as Sheriff of the City of Norfolk. At the initial pretrial conference, Olivo withdrew his prayer that he be reinstated. He seeks only monetary damages and attorney's fees.

Discussion

Mapp contends that this is a Connick[30] case and that in Connick cases qualified immunity should rarely be denied. McDaniel v. Woodard, 886 F.2d 311, 314 (11th Cir. 1989). Without question, but only up to a point, Connick is relevant to the issues in this case. In Connick, a former assistant district attorney brought a § 1983 action against the district attorney contending that her employment had been terminated because she exercised her First Amendment right to free speech. Myers, the assistant district attorney, was chagrined because Connick had ordered her transfer within the office to try different kinds of cases. She strongly opposed the move and expressed her views to several of her supervisors. In addition, she circulated a survey within the office to other assistant district attorneys to determine their opinions "concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political

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[30]Connick v. Myers, 461 U.S. 138 (1983). Defendant invokes the Connick analysis "[b]ecause the plaintiff alleges that he was dismissed on account of his `overt expressive conduct' . . . . Complaint ¶ 9." (Docket Entry #23, p.6) The phrase "overt expressive conduct" does not appear in the complaint. Only two of the four reasons for the firing were alleged to be expressive. The refusal to buy a ticket to the crabfeast and the failure to contribute to the campaign were not overtly expressive, nor were they alleged to be expressive. (Complaint, ¶ 22.)

campaigns." 461 U.S. at 141. The Supreme Court held, inter alia, as follows:

> We hold . . . that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Id. at 147. The Court proceeded to state that whether employee speech addresses a matter of public concern "must be determined by the content, form, and context of a given statement, as revealed by the whole record," (id. at 147-148), and that this inquiry is one of law, not fact. Id. at n.7;[31] see also Jones v. Dodson, 727 F.2d 1329, 1334 (4th Cir. 1984) ("[I]t is not a question of fact. If the expression was not upon a matter of legitimate public concern, no first amendment protection against discharge exists (though other first amendment protections may)," citing Connick, 461 U.S. at 147.)

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[31]The Court went on to hold that the subjects covered in the survey by Myers were not of public concern, except the one question asking if employees felt pressured to work in political campaigns of office supported candidates. The other questions just reflected her personal dissatisfaction with her transfer.

In the case at bar, Olivo's complaint is that he was fired for four reasons: 1) he did not buy a ticket to the crabfeast; 2) he expressed disapproval of the crabfeast and beer party; 3) he did not financially contribute to the sheriff's campaign; and 4) he expressed his neutrality. The first and second reasons are essentially the same, that is, that he did not buy a ticket because he disapproved of the event. Olivo alleged that he expressed his disapproval of the crabfeast and beer party because of his religious and ethical values. It is neither alleged nor suggested in any of the submissions in support of or in opposition to the motion for summary judgment that Olivo ever carried his message of religious and ethical concern to his fellow deputies, other than to Corporal Small, or to the electorate, or that he attempted and was prevented from bringing his views to their attention. It is not of public concern what religious and ethical values prompted Olivo to shun the event, nor was it made a matter of public concern because he told someone in the sheriff's department of his personal

views.[32] His views also expressed nothing about any wrongdoing or breach of trust on the sheriff's part. See Daniels v. Quinn, 801 F.2d 687, 690 (4th Cir. 1986). In Berger v. Battaglia, 779 F.2d 992, 999 (4th Cir. 1985), cert. denied, 476 U.S. 1159 (1986), the court said: "The focus is therefore upon whether the `public' or the `community' is likely to be truly concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a `private' matter between employer and employee." Therefore, the Count FINDS as a matter of law that if Olivo was fired because he did not buy a ticket to the crabfeast, and because he disapproved of the event on religious and ethical grounds, his constitutional right to freedom of speech was not violated. See Jones v. Dodson, 727 F.2d. 1329, 1334 (4th Cir. 1984) ("If the expression was not upon a matter of legitimate public concern, no first amendment protection against discharge exists.")

The remaining two grounds relied upon by Olivo

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[32]In Connick, the Supreme Court noted that speech "not otherwise of public concern does not attain that status because its subject matter could, in different circumstances, have been the topic of a communication to the public that might be of general interest." 461 U.S. at 148, n.8. In Maciariello v. Sumner, 973 F.2d 295, 299 (4th Cir. 1992), cert. denied, 113 S. Ct. 1048 (1993), Judge K.K. Hall expressed the idea this way: "Though they claim that they intended to speak out eventually, their intention expresses nothing. A hen may intend to lay an egg someday, but the omelet must await it."

may also be grouped together. Olivo's failure to contribute money to the sheriff's campaign and his statement that he stood neutral as to the outcome -- a statement which could be interpreted as a lack of support for the sheriff's candidacy -- are similar expressions, although one was passive. Again, as far as the exercise of free speech is concerned, neither expression was of public concern. The first -- the passive act of not contributing money -- would be difficult to envision as a matter of public interest under any circumstances. The second -- the statement to the second precinct police officer who asked Olivo what he thought the outcome of the election would be -- that he was neutral (and could not vote in Norfolk anyway), was not a matter of public interest. The Court so FINDS as a matter of law. Therefore, in the Connick sense, Olivo's first amendment right of free speech was not violated when the sheriff fired him.[33] These findings are urged by the sheriff. (Docket Entry #23, p.9) It does not follow, however, as the sheriff also urges, that further Connick analysis is necessary. The need for further Connick analysis ends with the findings that Olivo's speech was not of public interest.

There remains, nevertheless, the question of whether Olivo had a First Amendment right not to be coerced in his beliefs. In considering this questions the

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[33]The Court also FINDS as a matter of law that nothing done by the sheriff denied Olivo of his first amendment right to freely exercise his religious beliefs.

Court looks to Elrod v. Burns, 427 U.S. 347 (1976), and Branti v. Finkel, 445 U.S. 507 (1980). In Elrod, the Court stated the question as follows:

> This case presents the question whether public employees who allege that they were discharged or threatened with discharge solely because of their partisan political affiliation or nonaffiliation state a claim for deprivation of constitutional rights secured by the First and Fourteenth Amendments.

427 U.S. at 349. More specifically, "we are asked only to determine whether the politically motivated discharge of employees of the Cook County Sheriff's Office comports with the limitations of [those] Amendments." Id. at 352. The words of the plurality opinion by Justice Brennan, joined in by Justices White and Marshall, best answer the question:[34]

> Although political patronage comprises a broad range of activities, we are here

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[34]Justice Stewart wrote a concurring opinion, joined in by Justice Blackmun, in which he said: "The single substantive question involved in this case is whether a nonpolicymaking, nonconfidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs. I agree with the plurality that he cannot." Id. at 375.

> concerned only with the constitutionality of dismissing public employees for partisan reasons.

Id. at 353.

> The cost of the practice of patronage is the restraint it places on freedoms of belief and association. In order to maintain their jobs, respondents were required to pledge their political allegiance to the Democratic Party, work for the election of other candidates of the Democratic Party, contribute a portion of their wages to the Party, or obtain the sponsorship of a member of the Party, usually at the price of one of the first three alternatives. . . . [A]ny assessment of [a deputy's] salary is tantamount to coerced belief.

Id. at 355.

> [P]olitical belief and association constitute the core of those activities protected by the First Amendment. . . . [and] `if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics . . . or force citizens to confess by word or act their faith therein.' [Board

of Education v. Barnett, 319 U.S. 624, 642 (1943).]

Id. at 356.

> Patronage, therefore to the extent it compels or restrains belief and association is inimical to the process which undergirds our system of government and is `at war with the deeper traditions of democracy embodied in the First Amendment.' Illinois State Employees Union v. Lewis, 473 F.2d [561, 576 (7th Cir. 1972), cert. denied, 410 U.S. 928 (1973)].

Id. at 357.

> Under [patronage] practice, public employees hold their jobs on the condition that they provide, in some acceptable manner, support for the favored political party. The threat of dismissal for failure to provide that support unquestionably inhibits protected belief and association, and dismissal for failure to provide that support only penalizes its exercise.

Id. at 360.

> [T]he practice of patronage dismissals clearly infringes First Amendment interests [but] the prohibition on

encroachment of First Amendment protection is not an absolute.

Id.

> [I]f conditioning retention of public employment on the employee's support of the in-party is to survive constitutional challenge, it must further some vital government and end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights.

Id. at 363.

> Specifically, employees must always be discharged for good cause, such as insubordination or poor job performance, when those bases in fact exist.

Id. at 366.

> We hold, therefore, that the practice of patronage dismissals is unconstitutional under the First and Fourteenth Amendments, and that respondents thus stated a valid claim for relief.

Id. at 373.

In Branti v. Finkel, the employee slated for termination was an assistant public defender. The Court refused to limit Elrod to "situations in which government employees are coerced into pledging allegiance to a political party they would not voluntarily support [and to hold that it] does not apply to a simple requirement that an employee be sponsored by the party in power." 445 U.S. 507, 512. The Court said: "If the First Amendment protects a public employee from discharge based on what he has said, it must also protect him from discharge based on what he believes," id. at 515; and "the conclusion of both Mr. Justice BRENNAN and Mr. Justice STEWART [in Elrod was] that the First Amendment prohibits the dismissal of a public employee solely because of his private political beliefs." Id. at 516-17.

Both Elrod and Branti concerned plaintiffs who were of one major political party and who were discharged or threatened with discharge because of that affiliation, or because they had no sponsorship in the other major political party.[35] In the case at bar, there are no allegations concerning political parties, only that plaintiff was fired by the incumbent because he did not support the incumbent. If Elrod and Branti are to be limited to patronage practices involving Democrats firing

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[35]"To prevail in this type of action, it was sufficient, as Elrod holds, for respondents to prove that they were discharged `solely for the reason that they were not affiliated with or sponsored by the Democratic Party.'" Branti, 445 U.S. at 517, citing Elrod, 427 U.S. at 350.

Republicans and vice-versa, the sweeping language used in them is hollow indeed.[36] It would go for naught if a Republican employee has the protection of the First Amendment against being fired by a Democrat for raw patronage reasons, but a non-partisan employee has no such protection if he refuses support.

Sheriff Mapp argues, however, that the law on this issue is so uncertain that he is entitled to qualified immunity. He urges the Court to follow two decisions of the Seventh Circuit. In Upton v. Thompson, 930 F.2d 1209, 1212 (7th Cir. 1991), the court said that "[i]mmunity should be applied unless `it has been authoritatively decided that certain conduct is forbidden.' Alliance to End Repression v. City of Chicago, 820 F.2d 873, 875 (7th Cir. 1987)." In Upton, one probationary deputy sheriff, who was a Republican in a rural county employing about 75 deputies, alleged that he was fired by the new sheriff, a Democrat, because the deputy did not support the new sheriff in his campaign. In a second case considered in the same appeal, a deputy, who was a Democrat in an office with only four deputies, was fired by the new Republican sheriff after the deputy campaigned for the reelection of his brother, the former sheriff. In a crabbed opinion, the court held that the Elrod and Branti cases did not afford First Amendment protection to the two complaining deputy sheriffs, in the

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[36]But see Jones v. Dodson, 827 F.2d at 1334, n.6, where the Fourth Circuit indicates that the Elrod-Branti principle is to be applied only in narrow circumstances.

light of several Seventh Circuit cases decided subsequent to Elrod and Branti. The court reasoned that "[g]iven the dependancy of the sheriff (and his political survival) on his deputies' job performance, it is understandable why a sheriff might believe that party loyalty is an appropriate consideration for a deputy sheriff."[37] Id. at 1216. Noting a circuit split "on the question of whether a deputy sheriff is protected from political discharge," id. at 1217, the court reversed the trial court's denial of qualified immunity and remanded for reconsideration consistent with the court's view "that under Branti [and two post-

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[37]One might wonder why the First Amendment was not the controlling standard, rather than the sheriff's political survival.

Branti Seventh Circuit cases], a sheriff may use political considerations when determining who will serve as deputy sheriff." Id. at 1218.[38]

In Upton, the court cited Jones v. Dodson, 727 F.2d 1329 (4th Cir. 1984), as representative of the circuit split and noted:

> This circuit . . . has acknowledged a greater role for loyalty among those charged with the implementation of government programs than that expressed in Jones, although Jones did seem to allow considerable leeway for sanctioning combative political activity as opposed to mere political affiliation."

930 F.2d at 1217.

In Jones, two employees of a sheriff's department, one a deputy sheriff, claimed that they were discharged in violation of their first amendment rights. In its decision the Fourth Circuit said:

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[38]The other Seventh Circuit case that Sheriff Mapp urges on the Court is Dimmig v. Wahl, 983 F.2d 86 (1993), cert. denied, 114 S. Ct. 176 (1993), where the court held the same as it did in Upton. In Dimmig, interestingly, the court said that in Upton "[w]e held . . . that Illinois sheriffs do not violate the First Amendment by taking political considerations into account when deciding whether to fire a particular deputy sheriff." Id. at 87 (emphasis added).

> The Branti emphasis, which now controls in raw patronage situations, is not upon size, or intimacy of working associations, or needs of discipline, but upon the extent to which discharged employees engage in policymaking related to `partisan political interests' and have access to confidential information `bearing whatsoever on partisan political concerns.' Branti, 445 U.S. at 519. Flatly rejected in Branti was any general notion that mutual trust and confidence could only exist between members of the same political party in an agency of the small size there involved. . . .
>
> Under the Branti test, we do not believe that the duties of deputy sheriffs, no matter what the size of the office, or the specific position of power involved, or the customary intimacy of the associations within the office, or the undoubted need for mutual trust and confidence within any law enforcement agency, could be found to involve policymaking related to `partisan political interests' and to involve access to confidential information `bearing . . . on partisan political concerns.' [Citation omitted.]

Id. at 1338.

Sheriff Mapp places great emphasis on Whited v. Fields, 581 F. Supp. 1444 (W.D. Va. 1984), which was decided less than four weeks after Jones. In Whited, the new sheriff, a Democrat, upon taking office did not rehire twenty-nine of the thirty-four people serving the outgoing sheriff, a Republican, who did not seek reelection. All twenty-nine had actively campaigned for the incumbent's Republican chief deputy, who lost the election. Nineteen of the employees not rehired brought suit seeking a temporary restraining order to be followed by temporary and permanent injunctions, and compensatory and punitive damages. The court first issued a restraining order which preserved the positions of the nineteen when the new sheriff took office. Then, after considering the evidence, the court found that a substantial and motivating factor in the new sheriff's decision not to rehire the former sheriff's employees was their exercise of "their right of free speech to support a political candidate of their own choosing." Id. at 1448. The court also found that the new sheriff had failed to meet his burden of proving, but a preponderance of the evidence, that he would have reached the same decision in the absence of the exercise of their rights by the nineteen employees, and that the non-rehiring decision was wholesale and without consideration of the performance of any individual plaintiff. Id. at 1448. Judge Glen Williams then summarized the law following Elrod and Branti, praised Justice Powell for his dissenting opinion in Elrod and his "remarkable knowledge of the political system of the United States and the manner in which our basic two-party system of

government has operated in this county," id. at 1449, and warned:

> Anyone who would hold a constitutional office in Virginia . . . whether it be the treasurer, the commonwealth's attorney, the clerk, or the commissioner of revenue of a county, who changes a person of a different political party when he comes into office is opening wide the door for suit.

Id. at 1450.

Although the facts stated in Whited are clearly speech in the Connick sense,[39] Judge Williams stated that "[t]his court then will look to Elrod and Branti, the situation that exists in Virginia today, and the relationship between the sheriff and his employees in determining whether or not this case falls within an exception set forth in Elrod-Branti." Id. at 1452. First noting that "[t]here is something radically wrong with a society that permits this action[, i.e., what Elrod and Branti dictate]," Judge Williams stated that nevertheless,

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[39]"[T]he testimony shows that the plaintiffs were open and notorious in their support of Ken Martin by having bumper stickers on their cars and signs in their yards, attending rallies, working at the polls, furnishing monetary support, soliciting votes, and in some instances, participating as delegates to the Republican County Convention." 581 F. Supp. at 1446.

"bound by the precedent set by higher courts . . . the court will proceed to analyze this case within the narrow bounds of whether or not an exception in the Elrod-Branti doctrine applies in this case." Id. at 1452. The analysis was made under the heading "THE PUBLIC POLICY OF VIRGINIA AND ITS RELATIONSHIP TO THE ELROD-BRANTI RULE." Id. Important to Judge Williams in his analysis of the state's public policy was "to note that the state has seen fit to terminate the deputy at the same time that the sheriff leaves office and then to see if this policy bears any direct relationship to an employee's effectiveness in carrying out his job." Id. at 1453. He noted also that Florida and Texas have similar policies providing that the deputies' terms expire with the sheriff's, and that it had been held in cases decided in the Fifth Circuit that the relationship between a sheriff and his deputies under the state's law is a factor to be considered in deciding if there is an exception to Elrod and Branti.

After quoting extensively from an 1853 Virginia case and considering a 1973 Fourth Circuit case, Judge Williams concluded that

> [u]nder the public policy of Virginia, [first espoused in the common law,] a deputy sheriff and the sheriff are one and the same, and there is no distinction[40][; and t]o

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[40]The common law also held that husband and wife are one, and the one is the husband.

> mandate that a sheriff must accept the deputies that he finds in office simply because they belong to another political party even though he is totally responsible for all their acts is incredible, and beyond the bounds of common sense.

Id. at 1456 (footnote added). Judge Williams concluded that his decision was not at odds with Elrod and Branti, because those cases presented entirely different factual public policies. However, he did not mention the Fourth Circuit's decision in Jones in this part of his opinion. As previously noted, Jones held that the duties of deputy sheriffs do not place them within the unprotected area of those employees engaged in "policymaking related to `partisan political interests' and [who] have access to confidential information `bearing whatsoever on partisan political concerns'[, and that if a deputy's] discharge was solely because of his political party affiliation, it could not as a matter of law be justified under the Branti test." Jones, 727 F.2d at 1338. Judge Williams held that none of the deputies had any first amendment right to be rehired because the new sheriff "believed he was following the will of the electorate, and [] the public policy of Virginia serves a vital government end resulting in an exception to the Elrod-Branti doctrine," id. at 1457, although cooks, dispatchers, and secretaries did have a right to be rehired under the protection of the first amendment.

Sheriff Mapp argues that White has never been overruled, and therefore "it provides sufficient authority

to show that the law regarding Virginia sheriffs' ability to discharge employees for political beliefs is not clearly established." (Letter of Mr. Furr, June 7, 1994, to the undersigned in response to Mr. Marrs' letter of May 31, 1994) In Orga v. Williams C/A No. 4:92CV00064, (E.D.Va. 1/21/94), Orga and Stanaway, both deputy sheriffs, were fired on December 31, 1991, and January 3, 1992, respectively, by the sheriff. The case was decided under the principles of Connick v. Meyers, discussed supra, because the exercise of free speech was involved.[41] Nevertheless, in deciding that the sheriff was entitled to qualified immunity, Judge Jackson said:

> [T]he validity of the Whited interpretation was somewhat dubious at the time of Orga and Stanaway's dismissal. The Fourth Circuit had stated just a month before Whited, in a case dealing with a Virginia sheriff's office, that if a deputy's `discharge was solely because of his political party affiliation, it could not as a matter of law be justified under the Branti test.' Jones v. Dodson, 727 F.2d 1329, 1338 (4th Cir. 1984). Based on Jones, the Western District of Virginia later determined that the law forbidding discharge of deputy sheriffs solely for

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[41]The deputies did not actively campaign against the sheriff, but they spoke out in favor of his opponent when asked.

> political reasons was clearly established for qualified immunity purposes on January 1, 1992, precisely the time of [Orga and Stanaway's] dismissal. Robertson v. Holt, 92-0505-R and Crockett v. Holt, 92-0572-R (May 5, 1993).

Id. at 9-10. Judge Jackson concluded that in the Connick context the law was unsettled in January of 1992. Sheriff Mapp's argument that to deny him qualified immunity "would be in direct contradiction with this Court's recent decision in Orga v. Williams" (Mr. Furr's letter of 6/6/94) is not persuasive. Orga v. Williams was a Connick-speech case. This case is a Connick-speech case only up to the point that the Court concluded that Olivo's speech was not of public concern, but now it is an Elrod-Branti political patronage case.[42]

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[42]In his letter of June 7, 1994, Mr. Furr stated that "[p]laintiff has admitted [that this case] is an expressive conduct case controlled by Connick v. Myers." In his briefs and at the oral arguments, Mr. Furr stated that plaintiff alleged he had engaged in "overt expressive conduct." The Court advised Mr. Furr that the phrase "overt expressive conduct" did not appear in the complaint. Mr. Furr exhibited surprise and attempted without success to find the statement in the complaint.

In Robertson and Holt, cited by Judge Jackson, two non-party-affiliated deputies campaigned for the non-party-affiliated incumbent, who was defeated by the successful Republican challenger. The Republican winner advised the deputies on December 17, 1992, that he would not reappoint them. The deputies sued the new sheriff and two "municipal defendants." In denying qualified immunity, Judge Kizer stated:

> It has been well over a decade since the Supreme Court's holding that party affiliation must be an appropriate requirement for the effective performance of the public office, and the Municipal Defendants have failed to meet their substantial burden of showing that the employee's [sic] political party affiliation is essential to the employee's [sic] effectiveness in carrying out the responsibilities of the position. The law was clear that the Municipal Defendants could not discharge Robertson and Crockett solely based upon their political affiliations especially given the Fourth Circuit's holding [in Jones v. Dodson in 1984] that party affiliation is not an appropriate job requirement for deputy sheriffs.

Id. at 12.

Even if Whited is thought be to a viable expression of the current state of the law, it is clearly distinguishable from the case under consideration. Judge Williams heard testimony "on various dates" over a twelve day period. The evidence included not only testimony of the political activities of the plaintiffs during the campaign, but also evidence of the issues in the campaign and the winning challenger's belief that he was running against the entire sheriff's department and not just against the nominal Republican candidate. Judge Williams' impassioned opinion is totally involved with what he considered the most important facts in the case: a deputy's term ends with the end of the term of the sheriff who appointed him; a deputy and the sheriff are one indistinguishable person, that person is the sheriff, and his term ended. If the Whited case is the foundation for a qualified immunity defense, it would have to be in a case of the wholesale firing of a sheriff's department by the new sheriff. That scenario is not before this Court. This case alleges that the sheriff who was running for reelection fired a deputy four months before the election because the deputy did not support his campaign. Mapp's generalizations about the holding in Whited avail him little.

The sole remaining issue, one not addressed by the parties but alluded to throughout this discussion, is whether the Elrod-Branti test is confined to raw patronage cases, that is, to those situations where an employer with a party affiliation fires an employee who is affiliated with another party or is not sponsored by the dominant party, solely because of the employee's

affiliation or lack of affiliation. The Court has discovered no case directly addressing that issue, perhaps because Elrod and Branti have made it abundantly clear that it can not be so confined.[43] In Elrod, the Court said that "political belief and association constitute the core of those activities protected by the First Amendment." 427 U.S. at 356. In Branti, it said: "If the First Amendment protects a public employee from discharge based on what he has said, it must also protect him from discharge based on what he believes." 445 U.S. at 515. Cases that speak of raw patronage in terms of political parties can not intend to say that a citizen-employee who chooses to remain independent has no right to be free in his beliefs and associations if he works in a government job.

Although Whited, decided in 1984, is factually different from this case, and probably will not be followed in other cases that are factually similar to it, Judge Williams did forewarn constitutional officers like Sheriff Mapp of the risks of firing employees because of their political beliefs and actions. Accordingly, Sheriff Mapp is not entitled to qualified immunity.

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[43]It is most likely that Sheriff Mapp has not raised this issue because it is clear that Elrod and Branti are not so limited.

RECOMMENDATION

For the reasons stated above, it is RECOMMENDED that defendant's motion for summary judgment be DENIED.

DIRECTIONS FOR MAILING AND REVIEW PROCEDURES

The Clerk shall mail copies of this Report and Recommendation to counsel of record. By copy of this Report and Recommendation, the parties are notified that pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b):

1. Any party may serve upon the other party and file with the Clerk written objections to the foregoing recommendation within ten (10) days from the date of mailing of this report to the objecting party (see 28 U.S.C. § 636(b)(1)(C)), computed pursuant to Rule 6(a) of the Federal Rules of Civil Procedure, plus three (3) days permitted by Rule 6(e) of said rules.

2. A district judge shall make a de novo determination of those portions of this report or specific recommendation to which objection is made.

The parties are further notified that failure to file timely objections to the recommendation set forth above will result in waiver of right to appeal from a judgement of this court based on such recommendation. Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d

841, 846 (4th Cir. 1985) (quoting Carr v. Hutto, 737 F.2d 433, 434 (4th Cir. 1984), cert. denied, 474 U.S. 1019 (1985)); United States v. Schronce, 727 F.2d 91 (4th Cir.), cert. denied, 467 U.S. 1208 (1984).

/S/ William T. Prince
UNITED STATES MAGISTRATE JUDGE
Norfolk, Virginia

June 17, 1994

Clerk's Mailing Certificate

A copy of the foregoing Report and Recommendation was mailed this date to each of the following:

Bradley P. Marrs, Esquire
Gary C. Byler, Esquire
Counsel for Plaintiffs

William M. Furr, Esquire
Counsel for Defendant

Doris R. Casey, Clerk
By /S/ Ann F. Rives

Deputy Clerk

June 17, 1994

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Deputy Clerk

June 17, 1994

(2) 95-574

Supreme Court, U.S.
FILED
NOV 9 1995
CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1995

JOSE OLIVO,

Petitioner,

v.

DAVID K. MAPP, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITONER'S PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Was Respondent Sheriff Mapp entitled to qualified immunity when a Virginia Sheriff in his position could reasonably have believed that he could discharge one of his deputies for disloyalty?

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No. 95-574

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

JOSE OLIVO,

Petitioner,

v.

DAVID K. MAPP, JR.

Respondent.

BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondent David K. Mapp, Jr. respectfully requests this Court to deny the

petition for a grant of certiorari filed by Petitioner Jose Olivo on October 3, 1995.

JURISDICTIONAL STATEMENT

The Petitioner brought this action pursuant to 42 U.S.C. § 1983 alleging that he was discharged in violation of his First Amendment rights. Jurisdiction in the District Court was found at 28 U.S.C. §§ 1331 and 1343. The United States District Court for the Eastern District of Virginia, Norfolk Division denied Respondent's Motion for Summary Judgment based on the doctrine of qualified immunity. The Respondent appealed to the Fourth Circuit Court of Appeals. In an unpublished per curiam opinion, the Fourth Circuit granted Respondent's Motion for Summary Judgment. The Petitioner now invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The Respondent incorporates by reference the Statement of the Case issued by the United States Court of Appeals For The Fourth Circuit in Olivo v. Mapp, No. 94-2279, slip op. (4th Cir. June 8, 1995).

ARGUMENT

Given the state of federal and Virginia law at the time of Olivo's discharge, a reasonable person in Sheriff Mapp's position could reasonably (and

correctly) have concluded that discharging a deputy for disloyalty was a legitimate exercise of his mandate to maintain discipline and promote unity within the force.[1] Accordingly, the Fourth Circuit correctly granted Sheriff Mapp immunity from suit.

The proper application of the First Amendment to any given factual situation is rarely easily discerned. Applying the First Amendment in the context of public employment is particularly vexing, even for courts, because proper application requires courts to find the proper balance between two conflicting societal values: the individual's right to free speech and the public's right to the efficient provision of public services by its government. This latter right is particularly valued when the public employer is a paramilitary organization such as a Sheriff's Department. Benson v. Allphin, 786 F.2d 268 (7th Cir. 1986), cert. denied, 479 U.S. 848 (1986).

In cases such as the instant one where the Court must engage in an intricate balancing exercise, immunizing the public official from suit is clearly appropriate. In Harlow v. Fitzgerald, 457 U.S. 800, 818

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[1] Sheriff Mapp maintains that he discharged Olivo because of several reports he received that Olivo had abandoned his post. For summary judgment purposes, however, Olivo's factual allegations are taken as true.

(1982), the United States Supreme Court explained that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (emphasis supplied); see also Maciariello v. Sumner, 973 F.2d 295, 298 (4th Cir. 1992), cert. denied, _____ U.S. ___, 113 S. Ct. 1048 (1993). A right is clearly established only if "[t]he contours of the right [are] . . . sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). Thus, whenever "there is a legitimate question as to whether an official's conduct constitutes a constitutional violation, the official is entitled to qualified immunity." Wiley v. Doory, 14 F.3d 993, 995 (4th Cir. 1994).

I. THE FOURTH CIRCUIT CORRECTLY FOUND SHERIFF MAPP TO BE ENTITLED TO QUALIFIED IMMUNITY UNDER THE CONNICK-PICKERING TEST.

Public employees may not avoid the consequences of a discharge solely by invoking their right to free speech. Under the test articulated by the United States Supreme Court in Connick v. Myers, 461 U.S. 138 (1983) and Pickering v. Board of

Education, 391 U.S. 563 (1968), courts hearing First Amendment claims from discharged public employees must first consider whether the speech involved implicates a matter of public concern.[2] For speech to implicate a matter of public concern, the speech must be related to a "matter of political, social, or other concern to the community...." Connick, 461 U.S. at 146. Absent highly unusual circumstances, First Amendment protection is unavailable when "a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest...." Id. at 147.

Even if an employee successfully establishes that he or she spoke on a matter of public concern, courts must still consider "whether the employee's interest in the speech [is] outweighed by the employer's 'interest in the effective and efficient fulfillment of its responsibilities to the public....'" Joyner v. Lancaster, 815 F.2d 20, 23 (4th Cir. 1987) (quoting Connick, 461 U.S. at 150), cert. denied, 484 U.S. 830 (1987). A public employer is not liable for infringing upon an employee's freedom of speech, even if the speech is a matter of

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[2] As discussed infra, the test articulated in Pickering and Connick is the proper test to be applied to Olivo's claim.

legitimate public concern, if the public employer's interest in the effective and efficient fulfillment of its responsibilities to the public, on balance, outweighs the employee's interests in engaging in the speech activity. Jones v. Dodson, 727 F.2d 1329, 1336 (4th Cir. 1984) (citing Connick, 461 U.S. at 150-51).

By way of instruction to courts engaged in balancing these interests, this Court in Connick held "[t]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch." Connick, 461 U.S. at 151-52 (quoting Arnett v. Kennedy, 416 U.S. 134, 168 (1974)(Powell, J. concurring)). "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." Connick, 461 U.S. at 151.

A. The Fourth Circuit Correctly Ruled That Petitioner's Speech Was Not Entitled To First Amendment Protection Because It Was Not Related To A Matter Of Public Concern.

Speech is only constitutionally protected if it relates to matters of public

concern. Piver v. Pender County Board of Education, 835 F.2d 1076, 1078 (4th Cir. 1987), cert. denied 487 U.S. 1206, (1988). When determining whether an employee's speech relates to a matter of public concern, courts:

> do not focus on the inherent interest or importance of the matters discussed by the employee. Rather, [courts must] decide whether the speech at issue in a particular case was made primarily in the plaintiff's role as citizen or primarily in his role as employee. In making this determination, the mere fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment.

Terrell v. University of Texas Sys. Police, 792 F.2d 1360, 1362 (5th Cir. 1986), cert. denied, 479 U.S. 1064 (1987).

For these reasons, the Fourth Circuit correctly held that speech "not otherwise of public concern does not attain that status because its subject matter could, in different circumstances, have been the topic of a communication to the public that might be of general interest." Olivo v. Mapp, No. 94-2279, slip. op. (4th Cir. June 8, 1995)

(*Per Curiam* Opinion reversing the District Court) (quoting Connick, 461 U.S. at 148, n.8).

In Gillum v. City of Kerryville, 3 F.3d 117 (5th Cir. 1993), cert. denied, ____ U.S. ____, 114 S.Ct. 881 (1994), the plaintiff police officer claimed that he was terminated as a result of his involvement in an informal investigation of this police chief. In ruling that the plaintiff's speech did not relate to a matter of public concern, the Fifth Circuit held:

> Whether [the police chief] broke the law is of public concern, but that was not [the officer's] focus . . . . To be sure, corruption in an internal affairs department is a matter of public concern. [The officer's] focus was, however, on this issue only insofar as it impacted his wish to continue his investigation.

Id. See also McMurphy v. City of Flushing, 802 F.2d 191, 196-98 (6th Cir. 1986) (Police officer's accusations against his superiors did not touch upon a matter of public concern).

In Langlotz v. Picciano, 683 F. Supp. 1041 (E.D. Va. 1988), aff'd. 905 F.2d 1530 (4th Cir. 1990), the plaintiff, after being reprimanded by his employer (a public entity), responded by writing his employer

a letter accusing it of violating his constitutional right to freedom of speech and freedom of religion. After the public employer discharged the plaintiff, he filed suit claiming retaliatory discharge. The Court held as a matter of law that the plaintiff's letter, because of the context in which it was written, did not relate to a matter of public concern, but rather evidenced an employee grievance. Id. at 1050. Accordingly, the Court dismissed the suit.

The Fourth Circuit correctly held that Olivo's speech was by no means an attempt to bring Mapp's alleged practices to the public's attention. Olivo never attempted to communicate his grievance to the public at large. Rather, he spoke only to Corporal Small (regarding the crab feast) and Norfolk Police Officer Burt Williams (regarding his neutrality in the election). In fact, Olivo only spoke to Officer Williams because Officer Williams specifically inquired about his plans to attend the crab feast and his views on the election. In short, none of Olivo's actions evidenced any intent on his part to "go public" with his grievance. Rather, he privately communicated his concerns to two fellow law enforcement officials. While Olivo's speech may have achieved public concern status if it had been expressed under different circumstances, Connick clearly instructs

that speech "not otherwise of public concern does not attain that status because its subject matter could, in different circumstances, have been the topic of a communication to the public that might be of general interest." Connick, 461 U.S. at 148 n.8. See also Lipsey v. Chicago Cook County Criminal Justice Comm'n., 638 F. Supp. 837, 842 (N.D. Ill. 1986), aff'd. 815 F.2d 708 (7th Cir. 1987), cert. denied, 479 U.S. 848 (1986) (Plaintiff's allegations that supervisor was racially biased, made during the course of a salary dispute, did not deal with a matter of public concern).

Not only did Olivo fail to express his views publicly, he did not even make his views well known within the Sheriff's Department. Because Olivo failed to establish that his speech addressed a matter of public concern, the Fourth Circuit Court of Appeals properly concluded that Sheriff Mapp could reasonably (and correctly) have concluded that Olivo's speech did not relate to a matter of public concern. Accordingly, the Fourth Circuit correctly found Sheriff Mapp to be entitled to qualified immunity.

B. Sheriff Mapp Was Entitled To Qualified Immunity Because He Could Reasonably (And Correctly) Have Believed That His Mandate To Maintain Discipline And

Promote Loyalty Among His Deputies Justified His Decision To Discharge Olivo.

"There are special concerns in the area of law enforcement that allow for greater restrictions on the expression of public employees." Benson v. Allphin, 786 F.2d at 268, 278 (7th Cir. 1986), cert. denied, 479 U.S. 848 (1986); see also Jurgensen v. Fairfax County, Va., 745 F.2d 868, 880 (4th Cir. 1984). "Police departments 'regardless of the historical origin,' are 'paramilitary organizations' and the free speech rights of employees in those departments must thus be evaluated with the special character of the organization in mind." Jurgensen, 745 F.2d at 880.

In light of Sheriff Mapp's role as the head of a paramilitary organization, his right to restrict the First Amendment rights of his employees is broader than other governmental employers. Conversely, the plaintiff's free speech rights are more limited than other governmental employees.

For these reasons, numerous cases in the Fourth Circuit and elsewhere have upheld the right of a sheriff to discharge a deputy based on political considerations. In Joyner v. Lancaster, 815 F.2d 20 (4th Cir. 1987), cert. denied 484 U.S. 830 (1987), the Fourth Circuit held that a North Carolina

sheriff had lawfully discharged one of his employees for opposing his candidacy for reelection. In Joyner the Fourth Circuit noted: "[t]here is no question in this case that [Plaintiff's] political activity was the cause of his discharge." 815 F.2d at 22. The Court held, however, that the sheriff's interest in the efficient operations of his department outweighed the plaintiff's right to campaign against him. Id. at 24. Accordingly, the Fourth Circuit upheld the dismissal of the employee's action.

In Upton v. Thompson, 930 F.2d 1209, (7th Cir. 1991), cert. denied, 503 U.S. 906 (1992), the Seventh Circuit granted qualified immunity to a sheriff who had been sued by his former deputies. The deputies claimed that their discharges were impermissibly motivated by their political party affiliation. The Seventh Circuit held:

> The propriety of politically based firings of deputy sheriffs (as well as other positions) has received conflicting and confusing treatment. . . . The failure of the courts to develop and apply a consistent set of principles concerning patronage dismissals creates a context in which the [defendant sheriffs] (absent a direct holding on this

> issue) could have no clear understanding as to whether the deputy sheriffs had any constitutional protection from a political based discharge. The lack of clarity on this issue . . . necessarily extends the protection of qualified immunity to the [defendant sheriffs].

Id. at 1212-13 (emphasis supplied).

In Dimmig v. Wahl, 983 F.2d 86, 87 (7th Cir. 1993), cert. denied, ___ U.S. ___, 114 S. Ct. 176 (1993), the Seventh Circuit concluded that a sheriff did not violate his employee's First Amendment rights by discharging a deputy for refusing to assist in his reelection campaign. Specifically, the Seventh Circuit held: "[Plaintiff's] complaint lacks merit because the constitution permits [the sheriff] to discharge [Plaintiff] for refusing to campaign for him." Id. at 87.

In Pierson v. Gondles, 693 F. Supp. 408 (E.D. Va. 1988), the Court granted qualified immunity to a sheriff who demoted low level, non-policy making deputies who allowed their names to be used on a campaign flyer for the incumbent sheriff's challenger and played active roles in the challenger's campaign. The Court in Pierson correctly concluded that the law was not clearly established that the sheriff had violated

his employees' constitutional rights. Id. at 415.

In Whited v. Fields, 581 F. Supp. 1444 (W.D. Va. 1984), the Court held that a newly elected sheriff in Virginia can constitutionally replace his deputies because of their failure to support his candidacy in a reelection campaign. After a detailed analysis of the sheriff's responsibilities under Virginia law, the Court concluded that the sheriff "should have complete and unfettered control over who his deputies are ... ." Id. at 1455.

As the Seventh Circuit noted in Upton, "[t]he propriety of politically based firings of deputy sheriffs (as well as other positions) has received conflicting confusing treatment." Upton, 930 F.2d at 1212-13. Given the rulings in Joyner, Upton, Dimmig, Pierson and Whited, and given the difficulties inherent in predicting the outcome of any court's application of the Connick balancing test (see infra), Sheriff Mapp could reasonably have believed that he could legally discharge Olivo for disloyalty. As public officials are not held liable for bad guesses in murky areas of law, the Fourth Circuit correctly granted qualified immunity to Sheriff Mapp in this case.

II. THE FOURTH CIRCUIT PROPERLY APPLIED CONNICK V. MYERS TO THE PETITIONER'S CLAIM.

In Connick v. Myers, 461 U.S. 138 (1983) and Pickering v. Board of Education, 391 U.S. 563 (1968), the United States Supreme Court set forth the standard to be applied when a public employee alleges, as in the present case, that he was discharged because of expressive conduct. In Elrod v. Burns, 427 U.S. 347 (1976) and Branti v. Finkel, 445 U.S. 507 (1980) this Court set forth a different standard to be applied in cases where a public employer discharges an employee solely because of the employee's political party affiliation. See Jones v. Dodson, 727 F.2d 1329, 1334 (4th Cir. 1984); McBee v. Jim Hogg County, Texas, 730 F.2d 1009, 1014 (5th Cir. 1984)(en banc).

In the 1984 case of Jones v. Dodson, the Fourth Circuit confirmed that the Connick-Pickering test applies to cases such as the instant one where the plaintiff alleges retaliation for specific, overt expressive conduct. In distinguishing Connick-Pickering from Elrod-Branti, the Court held that Elrod and Branti only apply only to those rare cases involving discharge "solely because of the employee's political party affiliation". Id. at 1334. Specifically, the Court held:

> [Our interpretation of the Elrod-Branti test] deliberately

states the Elrod-Branti principle in terms narrowly confined to the specific facts of those cases, each of which involved discharges concededly based only upon the employees' party affiliations. We recognize that the principle might be thought to run as well to coerced political loyalty to individual employers (even of the same political party). . . . The effect of such an extension of Elrod-Branti patronage discharge principles would be, however, necessarily to carry over to other discharges than those solely for party affiliation, the extremely narrow justification basis defined in Branti. We do not believe that test is suited to the 'personal political loyalty' situation; it is too narrow. While it may adequately protect the only conceivable governmental interest in ensuring same-party affiliation of a public employee, it is not flexible or broad enough to protect governmental interests in avoiding a variety of employee 'expressions' involving

specific insubordination or dereliction of duty having a 'political' tinge, or, conceivably, deliberately given a 'political' cloak.

We therefore believe that raw patronage discharges of the Elrod-Branti type are properly treated as a narrow, special case within the wider category of first amendment discharges. Only in this narrow circumstance may the requisite balancing of governmental and individual interests appropriately be accomplished by the essentially rigid Branti inquiry. In the raw patronage situation both the individual and governmental interests are essentially fixed and unvarying in content. Balancing those interests from case to case does not require open-ended inquiry concerned with specific workplace relationships that may underlie overt expressive conduct. Where the protected activity involves overt 'expression of ideas,' the more open-ended inquiry prescribed by Pickering and its progeny are required to accomplish the necessary

> balancing. This is so even where the arguably protected activity involves 'political' speech or expression, particularly when the political speech impinges directly upon employee-employer relationships.

727 F.2d at 1334-35 n.6, (emphasis supplied) (citations omitted).

Petitioner's Complaint alleges that the Plaintiff was discharged for "expression(s)". Petitioner's Complaint does not allege a discharge based on political party affiliation. In fact, Petitioner told Officer Williams that he was neutral with respect to the upcoming election. Any reasonable Virginia sheriff in Sheriff Mapp's position at the time in question would have concluded (correctly) from this passage that the propriety of such a discharge would have been analyzed under Connick-Pickering.[3]

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[3] Even if Petitioner's claim is addressed under the Elrod-Branti test, Sheriff Mapp could reasonably (and correctly) have believed that he could discharge Petitioner for disloyalty under the authority of Whited v. Fields, 581 F. Supp. 1444 (W.D.Va. 1984). In Whited, the Court applied Elrod-Branti and upheld a sheriff's discharge of the majority of his deputies because they did not support him in an election. Although Petitioner argues that Whited was bad law at the time of his discharge in light of Jones v. Dodson, 727 F.2d 1329, 1338 (4th Cir. 1984), Whited was

III. QUALIFIED IMMUNITY HAS BEEN CONSISTENTLY GRANTED TO CLAIMS ANALYZED UNDER CONNICK V. MYERS.

At least six Circuit Courts of Appeals have concluded that because the Supreme Court's decision in Connick turns upon a fact-intensive balancing test, it can rarely be considered "clearly established" for the purposes of qualified immunity. Bartlett v. Fisher, 972 F.2d 911, 916 (8th Cir. 1992); Benson v. Allphin, 786 F.2d 268, 276 (7th Cir. 1986), cert. denied 479 U.S. 848 (1986); Guercio v. Brody, 911 F.2d 1179, 1183-85 (6th Cir. 1990), cert. denied 500 U.S. 904 (1991); Melton v. City of Oklahoma City, 879 F.2d 706, 728-29 (10th Cir. 1989), overruled on other grounds, 928 F.2d 920 (10th Cir. 1991)(en banc); Dartland v. Metropolitan Dade County, 866 F.2d 1321, 1324 (11th Cir. 1989); Noyola v. Texas Dept. of Human Resources, 846 F.2d 1021, 1024 (5th Cir. 1988).

In Bartlett, the Eighth Circuit stated:

> It would appear that, whenever a balancing of interests is required, the facts of the existing case law must closely correspond to the contested

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decided after Jones cited Jones. Thus, Sheriff Mapp could reasonably have relied upon it in deciding to discharge Petitioner.

> action before the defendant official is subject to liability under . . . Harlow. With Harlow's elimination of the inquiry into the actual motivations of the official, qualified immunity typically casts a wide net to protect government officials from damage liability whenever balancing is required.

Bartlett, 972 F.2d at 916 (citing Benson, 786 F.2d at 276.).

In Noyola, the Fifth Circuit granted qualified immunity to a public employer in a First Amendment case under Connick stating:

> One consequence of case-by-case balancing is its implication for the qualified immunity of public officials whose actions are alleged to have violated an employee's first amendment rights. There will rarely be a basis for a priori judgment that the termination or discipline of a public employee violated 'clearly established' constitutional rights. Connick and Rankin exemplify the difficulty of delineating any bright-line constitutional rule that might furnish a test for

> denying qualified immunity in such actions . . . . [R]easonable government officials, knowing only that they must not infringe on [employee free speech rights], would not necessarily know just what conduct was prohibited.

Noyola, 846 F.2d at 1025.

Because of the Connick balancing test, there will rarely be clearly established violations of employee constitutional rights. "Hence, even if [the plaintiff's] 'speech' was protected by the First Amendment, we . . . hold that neither the 'contours' of the rights were so clearly outlined nor was the `unlawfulness' of terminating [the plaintiff] so 'apparent' that [the public employer] should forfeit their qualified immunity." Id. at 1026.

In Benson, the Seventh Circuit commented:

> [t]he particularized balancing required by Pickering [and Connick] is difficult even for the judiciary to accomplish. Therefore, while it may have been clear since 1968 that a citizen does not forfeit his first amendment rights entirely when he becomes a public employee, the scope of those rights in any given factual

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situation has not been well defined.

Benson, 786 F.2d at 276. In granting the public official qualified immunity, the Seventh Circuit noted, "[g]overnment officials must be granted the ability to pass unmolested through bogs of murky legal precedent." Id. at 276, n.17 (quoting Murray v. Gardner, 741 F.2d 434, 440 n.2 (D.C. Cir. 1984), cert. denied 470 U.S. 1050 (1985)).

The Tenth Circuit has stated, "[b]ecause a rule of law determined by a balancing of interests is inevitably difficult to clearly anticipate, it follows that where Pickering balancing is required, the law is less likely to be well established than in other cases." Melton, 879 F.2d at 729. In finding partial qualified immunity, the Tenth Circuit held: "[t]he balancing of these competing interests would not have been so clear to a reasonable official under these circumstances that we can say it constituted 'clearly established law' under Harlow. We cannot expect individual defendants to have understood at the time of [plaintiff's] discharge that it was unconstitutional to fire [plaintiff] for his communications . . . ." Id.

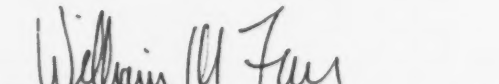
The Eleventh Circuit has similarly noted that "there will rarely be a basis for an a priori judgment that the termination or

discipline of a public employee violated 'clearly established' constitutional rights." McDaniel v. Woodard, 886 F.2d 311, 314 (11th Cir. 1989) (quoting Novola, 846 F.2d at 1025). As these six Circuit Courts of Appeal have noted, the law regarding the speech rights of public employees is in no way clearly established. Given the inherent uncertainty surrounding the outcome of any Connick balancing exercise and the case law (from the Fourth Circuit and elsewhere) specifically upholding the right of a sheriff to discharge a deputy who did not support him politically, it is simply not the case that the law applicable to 0Sheriff Mapp's actions was clearly established. Accordingly, the Fourth Circuit correctly granted Sheriff Mapp qualified immunity.

CONCLUSION

For the foregoing reasons, Respondent David K. Mapp, Jr. requests this Court to deny the petition for a grant of certiorari.

Respectfully submitted,



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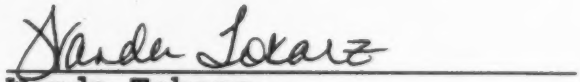
CERTIFICATE OF SERVICE

I certify that pursuant to counsel instructions, I mailed by certified mail, return receipt requested original and forty (40) copies of the foregoing Brief in Opposition to Petitioner's Petition for Writ of Certiorari to the Clerk's Office of the Supreme Court of the United States, and mailed three (3) copies to counsel of record for the Petitioner, Bradley P. Marrs, Meyer, Goergen & Marrs, Hamilton Place, Suite 208, 1301 Hamilton Street, Richmond, Virginia 23230-3959 on November 9, 1995.



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